

EXHIBIT

4

KING
vs.
PARKER, et al.

30(b)(6)

TONY PARKER

September 29, 2021



Jeannie Chaffin, LCR

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF TENNESSEE

3 TERRY LYNN KING,

4 Plaintiff,

5 vs.

Case No. 3:18-CV-01234

6
7 TONY PARKER, et al.,

8 Defendants.

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13 30 (b) (6) Video Deposition of:

14 TONY PARKER

15 Taken on behalf of the Plaintiff
16 September 29, 2021

17 Commencing at 9:02 a.m.

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I N D E X

Page

Examination
By Mr. Kursman

8

E X H I B I T S

Page

(None marked.)

S T I P U L A T I O N S

The 30(b)(6) video deposition of TONY PARKER was taken by counsel for the Plaintiff, at the offices of Bass, Berry & Sims, PLC, 150 Third Avenue South, Suite 2800, Nashville, Tennessee, on September 29, 2021, for all purposes under the Federal Rules of Civil Procedure.

All formalities as to caption, notice, statement of appearance, et cetera, are waived. All objections, except as to the form of the questions, are reserved to the hearing, and that said deposition may be read and used in evidence in said cause of action in any trial thereon or any proceeding herein.

It is agreed that JEANNIE CHAFFIN, LCR, Notary Public and Court Reporter for the State of Tennessee, may swear the witness, and that the reading and signing of the completed deposition by the witness was not discussed.

* * *

THE VIDEOGRAPHER: We are now on the record. Today is Wednesday, the 29th of September 2021, and the time indicated on the video screen is 9:02 a.m. This is the video deposition of the Tennessee Department of Corrections 30(b)(6) witness, Tony Parker, in the matter of Terry Lynn King versus Tony Parker, et al., case number 3:18-CV-01234 filed in the United States District Court for the Middle District of Tennessee.

This deposition is being held today at the office of Bass, Berry & Sims at 150 Third Avenue South in Nashville, Tennessee. My name is Augusta Smith, the videographer. And the court reporter is Jeannie Chaffin, both in association with Elite-Brentwood Reporting Services.

Will counsel please introduce yourselves and state whom you represent.

MR. KURSMAN: Good morning. My name is Alex Kursman, and I represent the Plaintiff, Terry King.

MR. MITCHELL: Good morning. My name

1 is Rob Mitchell. I represent the Defendants,
2 Tony Parker and Tony Mayes, as well as the
3 nonparty, Tennessee Department of Correction.

4 THE VIDEOGRAPHER: Will the court
5 reporter please swear in the witness.

6 (The Witness was sworn.)

7 MR. MITCHELL: Alex, do we want to do
8 that preliminary?

9 MR. KURSMAN: Yeah. So before we
10 begin I just want to put on the record that
11 Mr. Mitchell and I have agreed that all
12 objections will be subsumed in an objection to
13 the form. So Mr. Mitchell will just object to
14 the form when appropriate, when he feels it
15 appropriate.

16 MR. MITCHELL: Other than relevance
17 objections, right? Those will be reserved for
18 after?

19 MR. KURSMAN: Sure.

20 I also want to put on the record that
21 we've been entering exhibits in prior
22 depositions. We are just going to be using
23 those same exhibits in numerical order.

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* * *

TONY PARKER,

was called as a witness and having first been
duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. KURSMAN:

Q. Good morning, Commissioner Parker.

A. Good morning.

Q. Like I said, my name is Alex Kursman, and
I represent Terry King, who is the Plaintiff in
the case. It's the case King v. Parker,
pending in the Middle District of Tennessee.

Do you understand that you're here
today to answer questions related to the King
case?

A. I do.

Q. And what is your understanding of what
that case is about?

A. It's about a challenge of our lethal
injection protocol.

Q. And have you ever taken a deposition
before?

A. I have.

Q. How many times?

1 A. Several. I don't know the exact number.

2 But I would say more than 15.

3 Q. And what were those 15 cases about, if
4 you can recall?

5 A. Primarily -- some were employee issues.
6 Some -- I've also given depositions related to
7 the execution protocols in Tennessee. I've
8 given depositions for different things as it
9 relates to corrections.

10 Q. And when was the last time that you gave
11 a deposition as it related to the execution
12 protocol in Tennessee?

13 A. I would say two or three years ago.

14 Q. And have you ever served as a 30 (b) (6)
15 witness before?

16 A. Not to my knowledge, no.

17 Q. Okay. Your attorney may have already
18 gone over a lot of these rules, but I just want
19 to make sure that we are on the same page.

20 Do you understand that you are under
21 oath?

22 A. I do.

23 Q. And you understand that means you need to
24 tell the truth to the best of your ability?

25 A. I do.

1 Q. And is there any reason you can't testify
2 truthfully today?

3 A. No.

4 Q. Is there any reason you can't testify
5 accurately today?

6 A. No.

7 Q. Are you taking any medication right now?

8 A. No.

9 Q. Are you represented by counsel?

10 A. I am.

11 Q. And who is that?

12 A. The two gentlemen here to my right. I
13 would ask them to introduce themselves.

14 MR. MITCHELL: Mr. Mitchell and
15 Mr. Sutherland.

16 BY MR. KURSMAN:

17 Q. And as I'm sure you're aware, the court
18 reporter is making a record based on what you
19 say. So you will need to respond to questions
20 verbally rather than nodding your head.

21 A. I understand that.

22 Q. And in order for the court reporter to
23 accurately record your testimony, please wait
24 for me to finish my question before you give an
25 answer.

1 A. Okay.

2 Q. And I will do the same for you.

3 And if you don't understand a
4 question, just let me know and I will clarify
5 it. And if you answer a question, I will
6 assume that you understood my question, okay?

7 A. Okay.

8 Q. And if you need to take a break at any
9 time, just let me know.

10 A. Okay.

11 Q. However, if there's a question pending,
12 I'll ask that you answer that question before
13 we take a break, okay?

14 A. Okay.

15 Q. And your lawyer may object to my
16 questions from time to time, but you will still
17 need to answer my question unless the question
18 is based on a privilege assertion or based on a
19 statute. Do you understand that?

20 A. I do.

21 Q. Okay. And do you have any questions for
22 me?

23 A. I have none.

24 Q. Okay. Now, do you see that you have an
25 exhibit package in front of you?

1 A. Yes.

2 Q. Could you turn to Exhibit 69? And just
3 let me know when you get there.

4 A. Okay.

5 Q. And if you go to the third page -- it
6 says page 1 on that exhibit -- it says Schedule
7 A, areas of examination. Do you see that?

8 A. Yes.

9 Q. Do you understand that you are here today
10 to testify on behalf of the Tennessee
11 Department of Correction with respect to each
12 of these topics in Exhibit 69?

13 A. I do.

14 Q. Can you tell me what you did to prepare
15 today for your deposition?

16 A. I've met with my attorneys in this case.
17 I also would rely on my experience as
18 commissioner and the knowledge that I have
19 related to my position as commissioner of
20 Tennessee Department of Corrections to be
21 prepared to testify on these topics.

22 Q. Who did you meet with?

23 A. I met with these two gentlemen.

24 Q. And for how long?

25 A. Several hours.

1 Q. How many hours would you say?

2 A. Probably seven or eight.

3 Q. And how many meetings did you have?

4 A. I had two. Two over two days. Two
5 sessions over two days.

6 Q. Okay. And when were those sessions?

7 A. The last two days. So that would have
8 been Monday and Tuesday.

9 Q. And when you say you spent seven or eight
10 hours, is that a total amount of time you
11 spent?

12 A. I would be -- I would say we probably
13 spent between five to seven hours the first day
14 on and off with breaks. And then maybe three
15 to four hours the second day.

16 Q. Okay. So it was actually eight to eleven
17 hours total?

18 A. Approximately.

19 Q. Okay. And did you review any documents?

20 A. I reviewed several documents.

21 Q. Which documents were they?

22 A. I reviewed the execution protocol. I
23 reviewed documents related to storage of
24 chemicals. Several documents. I can't recall
25 every document that I've reviewed.

1 Q. Okay. So the two meetings that were
2 yesterday and the day before?

3 A. That's correct. And we have -- we have
4 met before. But I don't remember the exact
5 dates, nor do I remember the time spent in
6 those -- in those meetings.

7 Q. Sure. I'm only asking for the -- your
8 preparation for this deposition today.

9 A. I see.

10 Q. And you said that you have reviewed
11 several documents. You so far named the
12 execution protocol and the storage of
13 chemicals. What other documents did you
14 review?

15 A. Let me think. Logs related to
16 accountability of chemicals. Documents related
17 to the preparation of the drugs.

18 Again, I don't remember every
19 document that I reviewed. It would be very
20 difficult for me to recall every document that
21 I've reviewed.

22 Q. Well, how many documents would you
23 estimate that you reviewed?

24 A. Could have been 15 maybe. But again, I'm
25 estimating. I don't remember the exact number.

1 Q. Okay. Did you meet with anyone other
2 than your attorneys to prepare for this
3 deposition?

4 A. No. My attorneys have been the people
5 that I've met with.

6 Q. Okay. So to prepare for this deposition,
7 for instance, you didn't meet with the warden,
8 let's say?

9 A. No.

10 Q. And you didn't meet with anyone else who
11 serves on the execution team at the TDOC?

12 A. No.

13 Q. Okay. And did you meet with anyone else
14 in -- who has a leadership role at TDOC to
15 prepare for this deposition?

16 A. To --

17 Q. To prepare for this deposition. I
18 apologize.

19 A. No.

20 Q. Okay.

21 A. Other -- let me -- let me clarify that.
22 I'm sorry.

23 Q. Sure.

24 A. Debbie Inglis, who is a chief legal
25 counsel for the Department. Debbie was in the

1 meeting that I had with my attorneys, since
2 she's the chief legal counsel for the
3 Department. So she would be one that would
4 have been also included.

5 Q. Oh, so Ms. Inglis was in those two
6 meetings the past two days?

7 A. Correct.

8 Q. Okay. And what was her role in those
9 meetings?

10 A. Her role was to observe and to basically
11 clarify any issues that I may have had or the
12 attorneys may have had.

13 Q. Okay. And does she have a title in TDOC?
14 When I say TDOC, I'm talking about the
15 Tennessee Department of Correction. Does she
16 have a title in TDOC, aside from general
17 counsel?

18 A. She's the deputy commissioner, chief
19 legal counsel for the Department.

20 Q. Okay. And are those two separate
21 positions?

22 A. Actually not. She plays a role both as
23 chief legal counsel but also the supervision as
24 a deputy commissioner.

25 Q. And when she was in those two meetings,

1 was she serving as a deputy commissioner or as
2 chief legal counsel?

3 A. She was as chief legal counsel.

4 Q. Did you review the transcripts of any
5 other depositions taken in this case to prepare
6 for this deposition?

7 A. I reviewed some of my own prior
8 depositions related to a case. The prior
9 deposition I give related to the protocol a few
10 years ago. There were discussions during my
11 prep related to some depositions, but I don't
12 -- I don't recall who they were.

13 Q. Okay. Why did you review your prior
14 deposition testimony?

15 A. I felt it was relevant.

16 Q. Why?

17 A. Because it's regarding lethal injection
18 protocol and primarily, as I understand, the
19 same question that we're here today for. Or
20 that this case is built on.

21 Q. Did reviewing your prior testimony
22 refresh your recollection of any specific
23 issues?

24 A. In some cases it may have.

25 Q. Which cases would those be?

1 A. It could help me refresh my memory
2 related to conversations that I -- or knowledge
3 that I had related to -- prior communications
4 related to selection of our drugs. The process
5 of establishing the protocol.

6 Q. And what did -- what did you recall after
7 reviewing those depositions?

8 A. Well, it would be unfair to say that I
9 recalled an entire subject related to the
10 protocol and how it was established. There
11 could be elements of how the protocol was
12 established that I recalled. Such as the
13 people that I relied on and communicated with
14 in my decisionmaking of establishing the
15 protocol and the types of drugs we use. Things
16 like that.

17 Q. And can you tell me any specifics about
18 the things you remembered when reading your
19 deposition?

20 A. I can't -- I can't -- I don't recall
21 those specifics of it, no.

22 Q. Do you know why you were selected to
23 represent TDOC as its representative?

24 A. Because I am the commissioner. And I
25 represent the State in this case.

1 Q. Okay. And when you received Schedule A,
2 which is in Exhibit 69, did you go through
3 all -- all 29 topics with your counsel?

4 A. I have.

5 Q. Okay. And are you aware that you are
6 required to prepare to discuss the knowledge of
7 TDOC as an entity on all of these topics?

8 A. I am.

9 Q. And aside from what we -- what we just
10 discussed, in terms of what you reviewed and
11 who you met with, did you do any additional
12 preparation for any of the specific Topics 1
13 through 29?

14 A. Well, again, other than relying on my
15 knowledge and history with these topics that
16 are listed, as well as recalling my prior
17 depositions, which is related to these topics,
18 no.

19 Q. Well, let's go to, like, Topic 2 for a
20 second. Do you see it says, the manner in
21 which TDOC prepares or/and performs executions
22 under the execution protocol. Do you see that?
23 Number 2.

24 A. I do.

25 Q. Did you think that it was not relevant to

1 speak with members of the execution team to
2 prepare for Topic 2?

3 MR. MITCHELL: Object to the form.

4 You can answer.

5 THE WITNESS: Not necessarily. I
6 have knowledge of the protocol. I have
7 knowledge of what the Department of Corrections
8 has done to prepare to perform executions under
9 the execution protocol.

10 BY MR. KURSMAN:

11 Q. Okay. And let's go to -- let's go to
12 Topic 3. The creation, drafting, and
13 development of execution protocol. Do you see
14 that?

15 A. I do.

16 Q. Okay. Do you feel that it wasn't
17 necessary to speak with whatever members
18 created, drafted, and developed the execution
19 protocol to prepare for this deposition?

20 MR. MITCHELL: Same objection.

21 THE WITNESS: Again, my knowledge and
22 my involvement in this, along with the
23 individuals who drafted this protocol, I felt
24 like I had sufficient knowledge to testify.

25 ///

1 BY MR. KURSMAN:

2 Q. Okay. And let's go to Topic 4. The
3 decision or the determination to conduct or
4 perform executions utilizing the three-drug
5 protocol. Is it -- do you have that same
6 answer, that you feel that you have the
7 knowledge to discuss this as well for TDOC
8 without talking to other individuals?

9 MR. MITCHELL: Same objection.

10 THE WITNESS: Yes.

11 BY MR. KURSMAN:

12 Q. And what about Topic 5? Any steps taken
13 or considered to ensure that prisoners do not
14 experience pain, suffering, anxiety, or
15 distress during an execution. Do you see that?

16 A. I do see it.

17 Q. Okay. Tell me what you did to prepare
18 for Topic 5.

19 MR. MITCHELL: Same objection.

20 THE WITNESS: Again, we reviewed our
21 protocol. I understand the steps that we take
22 to ensure that prisoners do not experience
23 pain, suffering, anxiety, and distress during
24 the execution pursuant to the execution
25 protocol.

1 BY MR. KURSMAN:

2 Q. And how about 6? Any steps taken or
3 considered to monitor or determine whether a
4 prisoner experiences pain. What did you do to
5 prepare for that topic?

6 MR. MITCHELL: Same objection.

7 THE WITNESS: Again, I'm aware of the
8 knowledge that I have of the steps that are
9 built into our protocol that addresses Number
10 6. And my knowledge of that is what I'm
11 relying on.

12 BY MR. KURSMAN:

13 Q. So you're relying on your individual
14 knowledge; is that what you're saying?

15 A. I'm relying on my individual knowledge
16 and my knowledge of the specifics of the
17 protocol. And the rationale of why those steps
18 were placed in our protocol.

19 Q. So aside from reviewing the protocol, why
20 didn't you think it was necessary to talk to
21 the TDOC employees who take these steps to
22 monitor or determine whether a prisoner
23 experiences pain?

24 MR. MITCHELL: Objection. Form.

25 THE WITNESS: Would you repeat your

1 question? I'm sorry.

2 BY MR. KURSMAN:

3 Q. Sure. I apologize.

4 Why did you think it was not
5 necessary to talk to TDOC employees to
6 determine the steps taken or considered to
7 monitor or determine whether a prisoner
8 experiences pain?

9 MR. MITCHELL: Same objection.

10 THE WITNESS: The same steps that are
11 -- been in place for prior executions are still
12 in place. My knowledge and my -- my
13 conversations with people, such as the warden,
14 that have taken place in the past, who does the
15 consciousness check. It's still the same.
16 Nothing's changed there. And I have knowledge
17 of that.

18 And my experience as commissioner in
19 relation to my communication with the warden in
20 prior cases. And in -- as well as in
21 executions has not changed. That has not
22 changed. So I felt there was no need to go
23 back and talk to the warden again about those
24 steps or anyone else.

25 ///

1 BY MR. KURSMAN:

2 Q. Okay. And let's go to Topic 7. It says
3 any steps taken or considered to ensure that
4 drugs used in connection with the execution
5 protocol are properly injected into a prisoner.
6 What did you do to prepare for that topic?

7 MR. MITCHELL: Same objection.

8 THE WITNESS: Again, reviewed --
9 reviewed my notes. Reviewed information from
10 the pharmacist related to the drugs. And my
11 knowledge of the protocol as it relates to
12 Number 7.

13 BY MR. KURSMAN:

14 Q. So when you say you reviewed your notes,
15 which notes are you talking about?

16 A. I'm sorry. I said my notes. I'm talking
17 -- I'm talking about primarily the protocol.

18 Q. Okay. And you said you also reviewed
19 notes from the pharmacist?

20 A. Yeah. My -- I'm sorry. Were you
21 finished?

22 Q. No, no. Yeah, go ahead.

23 A. When I said notes, I'm talking about
24 specifically the sheets that they sent related
25 to instructions for the preparation of the

1 drugs.

2 Q. Oh, you're talking about the sheets that
3 the pharmacist sent to the -- to TDOC related
4 to the preparation of the drugs?

5 A. Correct.

6 Q. Okay. Did the -- did the pharmacist also
7 instruct how to properly inject the drugs into
8 the condemned inmate?

9 A. The instructions primarily were for how
10 you prepare the -- the items needed for the
11 preparation of the drugs in the -- in the
12 executioner's room, as well as how the drugs
13 are drawn up, mixed with the saline solution
14 for preparation to be pushed into the
15 condemned.

16 Q. Right.

17 So how would that help with Topic 7,
18 which is any steps taken or considered to
19 ensure that the drugs used in connection with
20 the protocol are properly injected into the
21 prisoner?

22 A. Well, again, there's steps taken to
23 ensure that we have people who are trained
24 to -- EMTs who start the IVs. And the
25 individuals who have been trained to connect

1 the lines, set up the IV lines, ensure the
2 proper preparation of the drug, the mixing of
3 the drugs in some cases, and how that drug is
4 administered through the IV lines into the
5 offender. That's --

6 Q. Sure. But my question, going over Topic
7 7, just so I'm clear: You just reviewed the
8 protocol and the instructions from the
9 pharmacist; am I right?

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: Let me make sure I
12 understand your question.

13 Again, to ensure -- ensure that drugs
14 used in connection with the execution protocol
15 are properly injected into the prisoner.

16 Again, EMT -- trained EMTs, part the execution
17 team who --

18 BY MR. KURSMAN:

19 Q. Yeah.

20 A. Maybe I misunderstood the question.

21 Q. Yeah, I'm sorry. I'm just asking what
22 materials you reviewed to prepare for this
23 topic. I'm not asking how they do it. All I'm
24 asking is what materials you reviewed to
25 prepare for Topic 7.

1 A. Again, the instructions from the
2 pharmacist, as well as the protocol itself.

3 Q. Okay. And let's go to Topic 8. Do you
4 see Topic 8?

5 A. Yes.

6 Q. What did you review to prepare for Topic
7 8?

8 A. Again, my experience as commissioner, as
9 well as the protocol itself.

10 Q. Do you -- do you know what a paradoxical
11 reaction is?

12 A. I do.

13 Q. Okay. And can you describe what a
14 paradoxical reaction is?

15 A. Paradoxical reaction is a -- would be --
16 may I give you an example? Would that be
17 appropriate?

18 Q. Sure.

19 A. So let's say, for instance, the use of a
20 drug that is designed and -- for its intended
21 purpose to sedate you and make you unconscious,
22 that it would have the adverse effect and make
23 you hyperactive and more alert. That would be
24 an example of a paradoxical effect.

25 Q. So for Topic 8 was there anything that

1 you reviewed, aside from the protocol itself
2 and the pharmacy instructions, to prepare for
3 Topic 8?

4 A. No. Other than my personal knowledge of
5 what that subject is talking about.

6 Q. Okay. And how about Topic 9, anything
7 other than the protocol and the pharmacy
8 instructions?

9 A. Other than my experience in witnessing
10 executions and the fact that -- the things that
11 I previously mentioned, no.

12 Q. Okay. And what about Topic 10?

13 A. Again, I relied on my knowledge and my
14 conversations that I had with individuals upon
15 establishing the three-drug protocol that we're
16 currently talking about with use of midazolam,
17 as well as my experience in witnessing the
18 actual executions in the state of Tennessee
19 with the use of midazolam. That's what I'm
20 relying on.

21 Q. And when you're saying your conversation
22 with individuals, you're talking about your
23 conversations with individuals at some point
24 prior to time, not to -- not in preparation for
25 this deposition today, right?

1 A. That would be correct.

2 Q. Okay. And how about 11? Did -- for
3 that, is it only -- to prepare for Topic 11,
4 did you only review the protocol and the
5 pharmacy instructions as well?

6 A. That's correct, as well as my knowledge
7 of that subject matter.

8 Q. Okay. And is that the same for Topic 12
9 as well?

10 A. Correct.

11 Q. Okay. Did you review anything other than
12 the protocol and the pharmacy instructions for
13 Topic 13?

14 A. And that's correct. But I want to make
15 sure I'm clear. The -- and as I've stated,
16 I've reviewed a lot of stuff. The documents
17 that I -- when we say just the pharmacy
18 instructions and the protocol, there could be
19 other documents, too. But sitting here now, I
20 can't recall every document that I've reviewed.

21 Q. Okay. You said there may have been 15
22 documents and that the only ones you can recall
23 right now are two, even though you reviewed
24 them yesterday and the day before?

25 A. That's -- again, I reviewed several

1 documents. But it's hard for me to recall
2 every specific one I -- that I've looked at.

3 Q. Okay. Do -- but you didn't talk -- did
4 you talk to any other individuals for any of
5 these topics, aside from your two attorneys who
6 are in the room today?

7 A. The two attorneys in the room. As -- I
8 had -- I talked to the executioner.

9 Q. Oh, you did talk to the executioner --

10 A. I did.

11 Q. -- after -- after receiving this, in
12 preparation for?

13 A. Yes, I did. That's correct.

14 Q. And when did you talk to the executioner?

15 A. I talked to the executioner yesterday.

16 Q. Okay. How long did you talk to the
17 executioner for?

18 A. Probably -- maybe 15 minutes.

19 Q. Why did you talk to the executioner?

20 A. There was a discussion related to the
21 preparation of the drugs itself, how they were
22 drawn up.

23 Q. And what did you and the executioner
24 discuss specifically?

25 A. Just the general concepts of, again,

1 going over the summary of how the midazolam,
2 vecuronium, and potassium chloride are drawn
3 up. And the two different sets of chemicals.

4 Q. And what did you ask the executioner?

5 A. I clarified related to some issues -- I
6 say issues. Some questions I had to confirm
7 the aseptic technique, as well as the use of
8 saline. What order -- how the midazolam was
9 mixed, the timing of the midazolam, things like
10 that.

11 Q. And what did the executioner tell you in
12 response to those questions?

13 MR. MITCHELL: Object to the form.
14 You can answer.

15 THE WITNESS: Yeah. He went over and
16 confirmed some of the information related to
17 the aseptic technique process. How saline was
18 used to mix the midazolam, the number of
19 syringes, the process that the executioner used
20 to push the drug. Talking about, you know,
21 times that -- you know, how each individual is
22 different. And things that -- things that he
23 confirmed that I thought that I already knew.
24 And as well as with the midazolam -- when it's
25 mixed, how it's mixed. Vecuronium and the

1 potassium chloride.

2 BY MR. KURSMAN:

3 Q. Okay. Can you describe for me what the
4 executioner told you was his process for
5 pushing the drugs?

6 MR. MITCHELL: Form objection.

7 You can answer.

8 THE WITNESS: Yeah. So the
9 executioner followed the protocol. The -- I
10 mean, do you want me to go through the whole
11 process of the warden --

12 BY MR. KURSMAN:

13 Q. No. What I'm asking is about your
14 conversation with the executioner yesterday.
15 And what I'm asking is what you said you asked
16 him. You wanted to clarify how he pushed the
17 drugs.

18 A. Okay.

19 Q. So what my question is, what was his
20 response yesterday? How does he push the
21 drugs? What was his response?

22 A. So he basically advised that he follows
23 the protocol as written. And he also follows
24 the steps, as far as the order of the drugs.
25 He talked about the difference in individuals.

1 The flow of the drug. How it could be, you
2 know, different for different individuals. He
3 talked about the observation of, you know,
4 ensuring he had the right order of the drugs.
5 There were several things.

6 Q. Right.

7 But my question is just, what is his
8 -- what did he say his technique was for
9 pushing the drugs? Because you said you asked
10 him what his technique was for actually pushing
11 the drugs. And I just want to know what his
12 response was to that.

13 A. I think his response was a slow, steady
14 push of the drugs without resistance.

15 Q. Okay. And did you ask him any follow-ups
16 as to how he would know that was correct?

17 A. No, I did not.

18 Q. Okay. And did -- and did you talk to
19 anyone else aside from the executioner?

20 A. Not that I recall.

21 Q. Okay. And how about for Topic 14? Did
22 you do anything else, other than what you've
23 described already as to prepare for Topic 14?

24 A. No.

25 Q. Okay. And what about Topic 15?

1 A. No. Other than what I've described.

2 Q. Okay. And did you do anything, other
3 than what you've described, to prepare for
4 Topic 16?

5 A. No.

6 Q. Did you -- so for Topic 16 did you -- did
7 you speak with the warden to prepare for Topic
8 16?

9 A. No. Other than, again, prior
10 discussions -- I've had prior discussions with
11 a lot of people. But in specific preparation
12 for this, no.

13 Q. Okay. And that's all I'm asking --

14 A. Okay. I understand.

15 Q. -- is in specific preparation for this.

16 And how about Topic 17? Anything
17 other than what you have previously described?

18 A. Again, other than what I've previously
19 described, as well as my communication with the
20 attorneys, with the Attorney General's office.

21 Q. And what do you mean by other than your
22 communication with the Attorney General's
23 office?

24 A. I mean, just that. The meetings that
25 I've had over the last two days, as well as

1 reviewing protocol and documents that I've
2 reviewed.

3 Q. Okay. And when you had these meetings
4 with the Attorney General's office, did you
5 discuss any nonlegal matters? And what I mean
6 by that is, decisions to come up with the
7 three-drug protocol, were they involved in
8 those decisions?

9 MR. MITCHELL: I'm going to object
10 and instruct the witness not to answer the
11 question.

12 MR. KURSMAN: Can -- Mr. Mitchell,
13 can you describe why? I'm only asking what his
14 preparation was for some of these topics. And
15 if the Attorney General's office acted as
16 non-attorneys on some of these to come up with
17 the protocol rather than providing with legal
18 advice, that would be certainly an appropriate
19 question.

20 MR. MITCHELL: So I think it's fair
21 to ask him if when developing the protocol, he
22 consulted with the Attorney General's office.
23 But I think -- let's chop it up a little bit,
24 and that might be easier to proceed --

25 MR. KURSMAN: Well --

1 MR. MITCHELL: -- if that's what
2 you're asking about.

3 MR. KURSMAN: I'm not.

4 BY MR. KURSMAN:

5 Q. But what I'm asking is, in your meetings
6 with the Attorney General's office yesterday,
7 did they give -- remind you of how -- of how --
8 or did they give you background information on
9 how to prepare for any of these topics?

10 A. No. I had -- it's information that I had
11 and relied on myself.

12 Q. So, for instance, did they remind you how
13 midazolam -- how Tennessee decided to use
14 midazolam?

15 A. No. That's -- that's -- the information
16 that was discussed was my recollection of that
17 and how that decision was made.

18 Q. Okay. And did you discuss with them how
19 Tennessee decided to use midazolam?

20 A. That was a topic of discussion in
21 relation to my involvement in that process,
22 when the decision was made in Tennessee to move
23 to a three-drug protocol.

24 Q. But aside from your involvement, your
25 personal involvement, what I'm asking about is

1 TDOC's decision to do so. You said Ms. Inglis
2 was in the room as well. Did you and her have
3 discussions during this meeting on why you
4 decided to switch to a three-drug protocol?

5 MR. MITCHELL: I'm going to object to
6 the form.

7 But I think you can answer.

8 THE WITNESS: And I'm having a little
9 difficult time understanding what your specific
10 question is.

11 Debbie Inglis was in the room when
12 these discussions took place. I discussed the
13 process that I went through, along with -- in
14 making the decision for the protocol that's
15 currently in place that uses the three-drug
16 protocol.

17 BY MR. KURSMAN:

18 Q. Right. But -- I'm sorry. My question
19 might be a little confusing.

20 MR. MITCHELL: Can we go off the
21 record real quick?

22 MR. KURSMAN: Sure.

23 THE VIDEOGRAPHER: One moment,
24 please. Going off the record at 9:40 a.m.

25 (Off-the-record discussions.)

1 THE VIDEOGRAPHER: Back on the record
2 at 9:42 a.m.

3 BY MR. KURSMAN:

4 Q. Before we went off the record, I was
5 asking about how you prepared for this
6 deposition. And I think I was asking it a bit
7 unartful.

8 What I want to know is, aside from
9 knowing what you personally did to choose
10 midazolam in the three-drug protocol, who else
11 did you talk to to figure out why TDOC, as an
12 entity, chose midazolam as the three-drug
13 protocol?

14 A. In preparation for this deposition?

15 Q. In preparation for this deposition.

16 A. Again, I talked to -- well, the meeting
17 that I had with the attorneys, with
18 Debbie Inglis in the room, as well as my
19 knowledge of why that decision was made years
20 ago and my involvement in that. That's what I
21 relied on to be prepared to testify in relation
22 to the topics you just mentioned.

23 Q. Okay. And did you have any conversations
24 with Ms. Inglis in the meetings the last two
25 days about why you switched from the one drug

1 to the three-drug protocol?

2 A. I mean, there was discussion about the
3 movement from the one drug to the three drug,
4 but I had personal knowledge of that. And I
5 would not have had a reason to ask
6 Debbie Inglis why I made the decision to go
7 from the one drug to the three drug, because I
8 knew. I mean, I already know that.

9 Q. Well, while you were at these two
10 meetings the last two days, did Ms. Inglis or
11 anybody else remind you of why you moved from
12 the one drug to the three-drug protocol?

13 A. It could have -- she could have discussed
14 the issue of pentobarbital not being available.
15 That could have come out in discussion. But it
16 was something that I already knew, obviously.

17 So again, there could have been a
18 discussion, or she could have said that. But
19 certainly it's not anything I would have relied
20 on to prepare to testify on this.

21 Q. How about the decision that midazolam --
22 TDOC's decision that midazolam could be used
23 safely in an execution, did you discuss that
24 yesterday?

25 A. Not that I recall.

1 Q. Did you discuss that on Monday?

2 A. Not that I recall.

3 Q. Okay. So aside from reviewing the
4 protocol and the pharmacy instructions and some
5 other documents that you can't recall right
6 now, was there anything else you did to prepare
7 for today to talk about TDOC's decision that
8 midazolam could be safely used in an execution?

9 A. Other than relying on my knowledge and
10 conversations that I had had in the past that
11 are, in my opinion, still relevant today
12 related to the use of midazolam and the
13 three-drug protocol, no.

14 Q. Okay. And would that be the same for
15 Topic 18?

16 A. That's correct. Including my -- again,
17 the -- my experience and my knowledge of the
18 pharmacy services agreement that we currently
19 have in place for the pharmacy to provide the
20 drugs.

21 Q. Okay. So is that another document you
22 reviewed, the pharmacy services agreement?

23 A. Yeah.

24 When I say protocol, I consider that
25 as part of the protocol that I look -- as far

1 as attachments that's in the protocol.

2 Q. Okay. And for Topic 18, for instance, do
3 you think you're the person at TDOC with the
4 most information on this topic?

5 MR. MITCHELL: Object to the form.

6 THE WITNESS: No, I wouldn't say
7 that. Probably the drug procurer has more
8 contact with the pharmacy than I do.

9 BY MR. KURSMAN:

10 Q. Okay. So why did you decide not to talk
11 to the drug procurer about Topic 18, to talk
12 about Topic 18?

13 A. Well, I've had many conversations with
14 the drug procurer relating to this topic but
15 not necessarily in preparation for this
16 conversation today. And I don't -- and that
17 information -- the drugs are still the same.
18 They still use the same pharmacist; the same
19 protocol is still in place. So I saw no reason
20 to do that.

21 Q. Okay. And what about Topic 19, did you
22 -- did you review anything else, other than
23 what you've previously told us, to prepare for
24 Topic 19?

25 A. No.

1 Q. Okay. And do you think that you are the
2 person at TDOC with the most information on
3 this topic, Topic 19?

4 A. Well, the warden would definitely be the
5 individual who would -- they are the ones who
6 select this, as well as the execution team at
7 the facility. But again, I'm very familiar
8 with that process. And it's also -- that
9 process is included in the execution protocol
10 for the selection of team members and how
11 that's laid out.

12 Q. So why did you decide not to talk to the
13 warden to prepare to talk about Topic 19?

14 MR. MITCHELL: Object to the form.

15 THE WITNESS: Well, again, I felt
16 like that I had an understanding of how the
17 team members were selected and how that process
18 worked.

19 BY MR. KURSMAN:

20 Q. And for Topics 20 to 29, did you review
21 anything else to prepare for those topics,
22 aside from what we've discussed?

23 MR. MITCHELL: Object to the form.

24 You can answer.

25 THE WITNESS: Other than the -- in

1 the alternative methods that are included here,
2 me discussing with the Attorney General's
3 office the issues that I have with these
4 alternative methods, as well as clarifying that
5 the -- none of these methods are approved by
6 the General Assembly as a form of execution for
7 Tennessee prisoners, as well as these methods
8 in most cases are not currently being used
9 in -- as well as some discussions with other
10 people that would have -- well, strike that.

11 People that are responsible in other
12 states for executions that these methods have
13 not been used. That would be all that I've
14 done to prepare for this.

15 BY MR. KURSMAN:

16 Q. So let me unpack that a little.

17 So are you saying that you had
18 discussions with people in other states in
19 preparation for this deposition?

20 A. I'm saying I had discussions related to
21 say, for instance, a cocktail, oral cocktail,
22 and is that a method that's used in other
23 states. Do you know -- you know, is anyone
24 using that for lethal injection or for
25 execution purposes. Things like that.

1 Q. Who did you have discussions with?

2 A. I had discussions with --

3 MR. MITCHELL: And I'm going to
4 interpose an objection based on DE-107, the
5 protective order.

6 If you can describe it without giving
7 names, let's maybe start there --

8 THE WITNESS: Yeah, I can describe
9 it --

10 MR. MITCHELL: -- without kind of
11 identifying individuals.

12 THE WITNESS: Other directors and
13 commissioners of corrections.

14 BY MR. KURSMAN:

15 Q. In which states?

16 MR. MITCHELL: And I'm going to,
17 again, object pursuant to protective order and
18 instruct the Commissioner not to answer that
19 question.

20 MR. KURSMAN: I'm only asking what he
21 did to prepare for this deposition. I'm not
22 asking what was used to prepare for the
23 execution protocol itself. There's nothing
24 that's protected by that in DE-107.

25 ///

1 BY MR. KURSMAN:

2 Q. My only questions are who you talked to
3 to prepare for this execution -- for this
4 deposition. So did you talk to the director of
5 prisons in Texas or somewhere else? That would
6 certainly be an appropriate answer to tell me.

7 And I'm not asking in preparation --

8 A. Okay.

9 Q. -- I'm asking in preparation for this
10 deposition. Not who you talked to to come up
11 with Tennessee's protocol. Just in preparation
12 for this deposition.

13 A. So if I -- if I say the state, you're
14 going to know the person, individual
15 specifically, that I discussed this with. You
16 understand that?

17 Q. Sure. And that's actually what I'm
18 asking for.

19 MR. MITCHELL: And so I'm going to
20 object and instruct him not to say what state.
21 If we can maybe -- some of this may be resolved
22 if we can -- if we can impose, kind of like,
23 timing. You can ask the timing, when these
24 discussions happened.

25 MR. KURSMAN: Right. Sure.

1 BY MR. KURSMAN:

2 Q. So I'm only asking in preparation for
3 this deposition today, who you spoke with in
4 preparation for this, so.

5 A. Okay. So let me -- you know -- all
6 right. So specifically in preparation for --
7 yeah. My discussions with other directors in
8 other states relating to the execution
9 protocols that they use or that I use centers
10 around the methods that they use, the drugs
11 they use; those that use electrocution, those
12 that do not. Those that have alternative
13 methods other than what are common, which is
14 the three-drug protocol or the -- in most
15 cases. Or the death by electrocution.

16 Those -- I guess those discussions
17 happened not necessarily in preparation for
18 this testimony. So I'm aware --

19 Q. One of the things you testified to that
20 was -- you said, I spoke with somebody at the
21 different department of corrections about an
22 oral cocktail to prepare for today. So --

23 A. Well, I would need to clarify that. I
24 don't know that I necessarily spoke to them in
25 preparation for this particular deposition.

1 The discussions of oral cocktails, the
2 discussions of other alternatives to executions
3 come up. They come up in conferences that I
4 have with other corrections directors. But to
5 say that I purposely sought out a director
6 regarding oral cocktail or a bullet to the back
7 of the head would be inaccurate.

8 Q. Okay. So let me ask a few questions.

9 After receiving this Schedule A,
10 areas of examination, did you speak with any
11 directors in other prisons?

12 A. I could have.

13 Q. Okay.

14 A. And the reason -- the reason I say that
15 is, we had a conference here in Nashville in
16 August, second week in August. And we -- I
17 spoke to a lot of directors. The issue of --
18 the issue of executions were part of some of
19 those discussions.

20 Q. Did you speak with any of these
21 directors, though, to prepare for your
22 testimony today?

23 A. Again, no. I would not say that I spoke
24 to them specifically to prepare for my
25 testimony.

1 Q. Okay. Let's go to Topics 26, 27, 28, and
2 29. Do you see that? They are all -- and also
3 25. Do you see they are all related to getting
4 different lethal injection chemicals?

5 MR. MITCHELL: Object to the form.
6 You can answer.

7 BY MR. KURSMAN:

8 Q. And my question -- my question is for
9 Topics 25, 26, 27, 28, and 29. Do you think
10 you're the person at TDOC with the most
11 information on these topics?

12 MR. MITCHELL: Object to the form.
13 You can answer.

14 THE WITNESS: No, I do not.

15 BY MR. KURSMAN:

16 Q. Okay. And who do you think the person is
17 at TDOC that has the most information on these
18 topics?

19 MR. MITCHELL: Same objection.
20 You can answer.

21 THE WITNESS: It would be the drug
22 procurer.

23 BY MR. KURSMAN:

24 Q. Is there a reason you didn't speak with
25 the drug procurer to prepare for Topics 25

1 through 29?

2 A. No.

3 Q. Okay. And if you go back on this same --
4 same notice, if we go back to Topics 11, 12 --
5 11 and 12, do you think you're the person at
6 TDOC with the most information on those topics?

7 MR. MITCHELL: Object to the form.

8 You can answer.

9 THE WITNESS: Repeat the question.

10 Do I think -- I'm sorry.

11 BY MR. KURSMAN:

12 Q. You're the individual at TDOC with the
13 most information on those topics --

14 MR. MITCHELL: Same objection.

15 BY MR. KURSMAN:

16 Q. -- Topics 11 and 12?

17 MR. MITCHELL: Same objection.

18 THE WITNESS: I would not say I'm the
19 person with the most direct knowledge, no.

20 BY MR. KURSMAN:

21 Q. Okay. And who would that person be?

22 A. That would be the drug procurer, as well
23 as the executioner.

24 Q. And why didn't you talk to the drug
25 procurer to prepare for Topics 11 and 12?

1 MR. MITCHELL: Same objection.

2 THE WITNESS: Again, I would rely on
3 the protocol, as well as the information that I
4 have available to me as commissioner.

5 BY MR. KURSMAN:

6 Q. Okay. If we go back to Topics 5, 6, and
7 7, do you think you're the person at TDOC with
8 the most information on these topics?

9 MR. MITCHELL: Object to the form.

10 THE WITNESS: I don't know that I
11 would have the most information or the -- I
12 guess depends on how you -- you know, what your
13 definition of qualified is. But obviously I --
14 if we talk about steps taken to ensure patients
15 do not experience pain, suffering, anxiety,
16 distress, there's a lot of things bundled up in
17 that -- in that Number 5 that could be broken
18 down to individual acts or responsibilities as
19 it relates to the protocol that other
20 individuals do personally that I do not.

21 I'm familiar with the process, but I
22 don't know that I'm the most -- person with the
23 most experience for that topic.

24 BY MR. KURSMAN:

25 Q. Who do you think would be the most

1 experienced?

2 A. Depends --

3 MR. MITCHELL: Object to the form and
4 also pursuant to the protective order.

5 If you can answer without giving
6 away, like, a name...

7 THE WITNESS: It would depend on the
8 specific area. Can you give me an example?

9 BY MR. KURSMAN:

10 Q. Sure. Any -- so for Topic 5 we have any
11 steps taken to ensure that a prisoner does not
12 experience pain during an execution. Do you
13 think that you are the person at TDOC with the
14 most information on this topic?

15 A. I think I'm the person who is responsible
16 for the protocol that's currently in place
17 that -- that uses the drugs that we use, as far
18 as, you know, if we talk about the
19 consciousness check and who's responsible for
20 that. Obviously the warden does that directly.
21 I would not have the same information that the
22 warden would have or the experience that the
23 warden would have. But --

24 Q. And is there a reason you didn't speak
25 with the warden to prepare for your testimony

1 today?

2 A. Well, it would be the same answer as
3 before, is that the process hasn't changed.
4 I've had prior discussions with the warden but
5 not necessarily in preparation for this -- for
6 this deposition. But those discussions
7 centered around the topics that ensure that the
8 inmate does not experience pain and checking
9 for consciousness, things like that.

10 Q. And how about -- and I will be done with
11 this in a second. How about Topic 14, why TDOC
12 made the determination to use a paralytic as a
13 second drug in a three-drug protocol, do you
14 think anyone at TDOC would know more
15 information than you on that topic?

16 A. As to why we selected that protocol, I'm
17 not sure that they would.

18 Q. Okay. Let's move on to exhibit -- you
19 know, let's not move on to exhibit -- let's
20 move on to Exhibit 1. Do you see -- do you see
21 Exhibit 1?

22 A. Yes.

23 Q. And this is titled Lethal Injection
24 Execution Manual, Execution Procedures for
25 Lethal Injection?

1 A. Yes.

2 Q. This is what we've been referring to as
3 the protocol, right?

4 A. That's correct.

5 Q. Are the instructions in the protocol
6 mandatory?

7 MR. MITCHELL: Object to the form.
8 You can answer.

9 THE WITNESS: The instructions in the
10 protocol are just as they've written -- as is
11 written here. It's a guide for the warden to
12 utilize in the -- in carrying out lethal
13 injection in the state of Tennessee.

14 BY MR. KURSMAN:

15 Q. When you say it's a guide, my question
16 is, do they have to follow the instructions in
17 this protocol?

18 A. Yes. They're required and expected to
19 follow the protocol, yes.

20 Q. So can any member of the execution team
21 deviate from the protocol?

22 MR. MITCHELL: Object to the form.
23 You can answer.

24 THE WITNESS: Well, I don't know
25 that -- let me think about that. You know, I

1 don't know that I would call it deviate. The
2 spirit of the protocol is written to ensure
3 that individuals sentenced to death that are
4 executed by lethal injection, that process is
5 carried out using this manual as a guideline to
6 do that in the most humane, constitutionally
7 protected way possible.

8 And I'll try to answer your question
9 by giving you an example. If the protocol
10 talks about a -- you know, a 7 o'clock start
11 time or this -- mentions different times that
12 different events will take place, there could
13 be an unforeseen event that occurs that delays
14 that time. And if that time is delayed,
15 obviously -- let's say the process of -- you
16 know, beginning -- a process at 7 o'clock
17 started at 7:05 because of a -- of an issue at
18 -- with the strap-down team. Obviously --
19 BY MR. KURSMAN:

20 Q. Who decides -- who decides whether the
21 execution team can deviate?

22 MR. MITCHELL: Object to the form.

23 THE WITNESS: Well, let me finish my
24 answer, if you don't mind.

25 So that would require the -- a

1 deviation -- as you say a deviation. I would
2 say an adjustment. A necessary adjustment that
3 would be -- have to be made by the warden. He
4 wouldn't stop the process at that time and call
5 me. It would continue on because of an
6 unforeseen event.

7 So that's an example of how it could
8 be different than what is written here.

9 BY MR. KURSMAN:

10 Q. Sure.

11 But who decides whether the execution
12 team can deviate from what's written in the
13 protocol?

14 MR. MITCHELL: Object to the form.

15 THE WITNESS: Again, adjustments take
16 place during the process. The warden is in
17 charge with -- of that -- of the process in the
18 -- in the chamber. The warden -- and if he has
19 to make adjustments, can make particular
20 adjustments.

21 But I want to be clear that those
22 adjustments -- he does not have the authority
23 to make the adjustment, as he knows, to avoid
24 the consciousness check. Or to -- you know, if
25 he sees a sign of the inmate being conscious,

1 to continue on with the process.

2 BY MR. KURSMAN:

3 Q. So how does he know which instructions he
4 can deviate from and which instructions he has
5 to follow?

6 MR. MITCHELL: Object to the form.

7 THE WITNESS: Again, he follows the
8 execution protocol. Tony Mayes is a -- almost
9 a 38-year professional in corrections. He's a
10 leader. He's -- has extensive knowledge in
11 corrections and -- as well as in the execution
12 protocols for lethal injection, as well as
13 electrocution. He's carried out multiple
14 executions. And his experience and his
15 knowledge of the intent of the protocol and
16 those things that are appropriate for an
17 adjustment and those things that are not, he
18 has knowledge of that.

19 And he also has direct contact with
20 the commissioner onsite during this process.
21 Should he have an issue that he's not aware of,
22 he could reach out to me at any time.

23 BY MR. KURSMAN:

24 Q. Is it TDOC's position that only the
25 warden can deviate from the protocol, or can

1 other members of the execution team also
2 deviate from the protocol as they see fit?

3 MR. MITCHELL: Object to the form.

4 THE WITNESS: Again, you use the word
5 deviate. I use the word to make adjustments.
6 There may be adjustments that could be
7 required -- let me say minor adjustments. And
8 by minor adjustments, I could give you an
9 example that might not go word for word with
10 what the protocol says. But they do not
11 violate the spirit of the protocol, of what the
12 protocol is intended to accomplish.

13 BY MR. KURSMAN:

14 Q. Okay. You said you could give me an
15 example?

16 A. Okay. So, for example, of -- again, the
17 adjustment in time of where the protocol says
18 X, Y, and Z starts at 7 o'clock or 5 o'clock.
19 Or you may have a delay. Somebody may be
20 delayed. Or you may have an issue with a
21 particular --

22 Q. What about an adjustment of preparing the
23 drugs, would that be an appropriate deviation
24 that members of the execution team could
25 decide?

1 MR. MITCHELL: Object --

2 THE WITNESS: Give me an example.

3 MR. MITCHELL: I'm sorry.

4 THE WITNESS: Give me an example.

5 BY MR. KURSMAN:

6 Q. Sure. Let's say the execution team
7 decides they only need to prepare one set of
8 drugs, even though the protocol requires two.
9 Would that be an appropriate deviation?

10 MR. MITCHELL: Objection to the form.
11 You can answer.

12 THE WITNESS: The preparation for the
13 drugs, that would be -- we prepare two sets of
14 drugs. So an adjustment of -- like that I
15 would have to look at the details or know the
16 details of something like that. Again, delay
17 -- a delay of preparing the second set might be
18 appropriate for certain reasons.

19 BY MR. KURSMAN:

20 Q. But my question is a little more direct,
21 which is just if members of the execution team
22 decided they only wanted to prepare one set of
23 drugs rather than two, is it TDOC's position
24 that that would be an appropriate deviation or
25 adjustment?

1 A. No.

2 MR. MITCHELL: Form objection.

3 You can answer.

4 THE WITNESS: The protocol calls for
5 preparation of two sets of drugs. So we --

6 BY MR. KURSMAN:

7 Q. If a member of the execution team wants
8 to deviate or adjust from the protocol, what do
9 they have to do? Is there a chain of command
10 they have to go up?

11 MR. MITCHELL: Form objection.

12 You can answer.

13 THE WITNESS: Again, for minor
14 adjustments that need to be made, the warden is
15 certainly carrying out that process within the
16 chamber. Again, for the -- a member of the
17 execution team to say that we do not -- I'm
18 just not -- we're not going to prepare a second
19 set of drugs, a backup set, would not be
20 appropriate.

21 BY MR. KURSMAN:

22 Q. Okay. Is TDOC aware of whether -- aside
23 from timing that you just mentioned, aware of
24 whether members of the execution team have
25 deviated in the past from the execution

1 protocol?

2 MR. MITCHELL: Objection to the form.

3 And also, Alex, what topic of examination is
4 that related to?

5 MR. KURSMAN: I believe it's -- that
6 would be 2, the manner in which they perform
7 executions under the execution protocol.

8 MR. MITCHELL: I'm going to object
9 and say that's outside the scope.

10 But you can answer.

11 THE WITNESS: Would you repeat the
12 question, please?

13 BY MR. KURSMAN:

14 Q. Sure.

15 Is TDOC aware of any times -- aside
16 from the timing that you just mentioned, aware
17 of any times that members of the execution team
18 have deviated from the protocol?

19 MR. MITCHELL: Same objection.

20 You can answer.

21 THE WITNESS: When you say other than
22 timing, TDOC is not aware of any deviation, as
23 you say, or adjustments from the protocol that
24 violate the spirit or the intent of the
25 protocol.

1 BY MR. KURSMAN:

2 Q. And when you say violate the spirit or
3 intent of the protocol, what do you mean by
4 that?

5 A. I mean the process as laid out. The
6 major components of the -- of the execution
7 protocol that speak to the -- the chemicals
8 used, the process of -- of --

9 Q. So is it --

10 A. The amount --

11 Q. Is it TDOC's position that members of the
12 execution team can deviate or adjust from the
13 protocol, so long as it does not violate the,
14 quote/unquote, spirit or intent of the
15 protocol?

16 MR. MITCHELL: And I'm going to,
17 again, say form objection, also outside the
18 scope.

19 You can answer.

20 THE WITNESS: No, it's not. Again,
21 there are things that happen during an
22 execution that could require an adjustment,
23 that could require a delay in some cases. But
24 those adjustments, again, are not what I would
25 consider a major adjustment that would violate

1 the spirit or the intent of the protocols.

2 BY MR. KURSMAN:

3 Q. And what would you consider a major
4 adjustment?

5 A. Skipping the consciousness check. Or
6 ignoring a sign of consciousness during the
7 consciousness check. Or using potassium
8 chloride before you use vecuronium. Or
9 things -- again, that's just some examples.

10 Q. Would storing the drugs differently than
11 what's required by the protocol be a major
12 deviation from the protocol?

13 MR. MITCHELL: Object to the form.
14 And also outside the scope.

15 You can answer.

16 THE WITNESS: The storage of drugs
17 should be as directed by the pharmacist and the
18 pharmacy service agreement with the pharmacist
19 and the instructions that we receive from the
20 pharmacist. They should be stored as directed.
21 Yes, that is an important aspect.

22 BY MR. KURSMAN:

23 Q. Even if the protocol says otherwise?

24 MR. MITCHELL: Same objections.

25 THE WITNESS: We should store the

1 drugs as required by the pharmacist and per the
2 instructions of the pharmacist.

3 BY MR. KURSMAN:

4 Q. So if the protocol says store the drugs
5 using this method and the pharmacist says store
6 the drugs using a different method, it's TDOC's
7 position that members of the execution team
8 should always follow what the pharmacist says?

9 A. Can you show me in the protocol where you
10 are referring to?

11 Q. Yeah, I will do that later. But this is
12 just a general question right now.

13 MR. MITCHELL: Both form and scope --
14 form and scope objections.

15 You can answer.

16 THE WITNESS: Again, we should store
17 the drugs as directed from the pharmacist, in
18 that we have a contract with with the pharmacy
19 service agreement for the drugs that we receive
20 from that pharmacist.

21 BY MR. KURSMAN:

22 Q. If that is TDOC's position, why isn't
23 that written in the protocol?

24 A. I don't know. Maybe it should be. I
25 don't know.

1 MR. KURSMAN: Could we take a
2 ten-minute break?

3 MR. MITCHELL: Sure.

4 THE VIDEOGRAPHER: One moment,
5 please. Going off the record at 10:19 a.m.

6 (Short break.)

7 THE VIDEOGRAPHER: Back on the record
8 at 10:32 a.m.

9 BY MR. KURSMAN:

10 Q. We just went on break. While we were on
11 break, did you have any discussions with your
12 attorneys?

13 A. I did not.

14 Q. Now, before we were -- we left for break,
15 we were discussing deviations or adjustments
16 from the protocol. And I believe one of -- one
17 of the things you testified to was that if the
18 protocol says X and the pharmacy owner says Y,
19 the execution team is to follow the pharmacy
20 owner; is that right? Or the pharmacist, I
21 apologize.

22 A. In relation to the chemicals and the
23 storage and the -- that is -- we would follow
24 the directions of the pharmacist that provided
25 the chemicals.

1 Q. Why -- why would you follow the
2 directions of the pharmacist?

3 A. Well, we -- they are the individuals that
4 are responsible and qualified to provide the
5 chemicals, as well as that's who we have a
6 pharmacy service agreement with. They are
7 required to meet the regulations of the
8 compounding of chemicals or the supply of
9 manufactured chemicals. And that is who --
10 that is the entity that we would rely on to
11 provide the information of how those chemicals
12 should be properly stored.

13 Q. Okay. And you said multiple -- I think
14 you used the term multiple individuals. Is
15 there more than one pharmacist, or is there one
16 pharmacist that TDOC --

17 A. Well, the pharmacy that we have the
18 services agreement with to provide the
19 chemicals.

20 Q. Is it just one pharmacist that you know,
21 or is it more than one pharmacist?

22 A. As far as I know -- there may be more
23 than one pharmacist working there. But in --
24 there's one pharmacy that we have an agreement
25 with.

1 Q. And is it TDOC's belief that the
2 pharmacist has specialized expertise?

3 A. Yes.

4 Q. Okay. And does the pharmacist have
5 expertise that TDOC does not have?

6 A. Yes.

7 Q. Okay. And is that expertise in relation
8 to the drugs?

9 A. It is.

10 Q. Okay. Have there been times where the
11 pharmacist or pharmacy entity that you're
12 dealing with has suggested that you do
13 something that TDOC has not undertaken?

14 MR. MITCHELL: And what topic of
15 examination is that related to?

16 MR. KURSMAN: That would be 3, again.

17 MR. MITCHELL: I'm going to object to
18 the form; say outside the scope.

19 And you can answer, Commissioner.

20 THE WITNESS: Not that I'm aware of.

21 BY MR. KURSMAN:

22 Q. Okay. Let's go back to Exhibit 1.

23 A. Let me clarify something, too. In
24 previous questions that were asked about the
25 drug procurer, I want to make sure that I'm

1 clear on this. The drug procurer serves other
2 purposes in the Department, too. As far as my
3 conversations with the drug procurer, I've had
4 a conversation with the drug procurer related
5 to the subject matter of another topic. But I
6 did ask the question related -- of the drug
7 procurer related to current chemicals on hand
8 that were not expired. I want to be clear
9 about that. I had that conversation this
10 morning. But it wasn't -- I don't know that I
11 would say it was in specific preparation for a
12 particular topic item; although, it could be.

13 But just for clarification, I did
14 talk to the drug procurer this morning. The
15 initial discussion was around a topic related
16 to contracts that has nothing to do with this
17 process. But that question, I did ask that
18 question. So I want to make sure I'm clear
19 about that.

20 Q. Okay. So just so I'm clear, this morning
21 you had a conversation with the drug procurer,
22 just asking the drug procurer, do we have any
23 expired drugs on hand?

24 A. Yeah. That was the topic of the
25 question, yes.

1 Q. Okay. And what did the drug procurer say
2 back?

3 A. Just said that the only drugs that we had
4 on hand that were not expired was the
5 vecuronium.

6 Q. And you said the drug procurer has dual
7 roles within the Department. What other roles
8 does the drug procurer have?

9 MR. MITCHELL: I'm going to object to
10 that and instruct the Commissioner not to
11 answer based on the protective order, the 107.

12 BY MR. KURSMAN:

13 Q. Okay. Does the drug procurer have any
14 other roles in the execution procedure?

15 A. No, other than -- other than the -- the
16 role of the drug procurer. No.

17 Q. Okay. Let's go back to Exhibit 1.

18 A. Okay.

19 Q. And that would be the execution protocol
20 that we were just talking about.

21 A. Yes.

22 Q. Can you tell me each person that was
23 involved in the creation of the execution
24 protocol?

25 MR. MITCHELL: And there I'm going to

1 object just based on the protective order and
2 say that there's certain people -- and I think
3 you know this. If you can do it without
4 identifying names and maybe say role or role
5 within the protocol or something like that.

6 THE WITNESS: So, yes, myself, as
7 commissioner. Debbie Inglis, chief legal
8 counsel. So I just said her name.

9 The commissioner -- assistant
10 commissioners in the Department related to
11 prison operations. The drug procurer. Myself,
12 in conjunction with the Attorney General's
13 office. Primarily that was -- that's it.

14 BY MR. KURSMAN:

15 Q. And what was each person's role that you
16 just described in creating the protocol?

17 So we can go through it one by one.

18 What was your role in creating the
19 execution protocol?

20 A. My role was basically to review the
21 protocol and to approve a protocol that was
22 written. Submit it as the official protocol
23 for the Department.

24 Q. And what was Ms. Inglis's role?

25 A. Again, to serve as chief legal counsel,

1 as well as to provide input and advice related
2 to the protocol.

3 Q. What was the drug procurer's role?

4 A. Again, the drug procurer's role would be
5 to speak in -- on behalf of the ability of the
6 drugs -- the drugs that were available. Any
7 information that they would have from the
8 pharmacist in relation to the drugs, the type
9 of drugs, the amount of drugs, the quantity of
10 the drug -- of the strength of the drug, things
11 like that.

12 Q. When you say the amount, quantity, and
13 strength, are you saying that the drug procurer
14 came up with the amount, quantity, and strength
15 of the drug protocol?

16 A. No, I'm not. I'm -- his communication
17 with the pharmacist in developing and providing
18 information related to the protocol.

19 Q. Okay. Just -- I just want to be clear
20 about this. So it was the pharmacist who came
21 up with the strength and the amount of the
22 drugs of the protocol?

23 A. I don't know that it was totally the
24 pharmacist. I think the pharmacist had input
25 on it.

1 Q. Uh-huh.

2 A. We also considered other protocols that
3 were used, as well as -- again, as I
4 understand, information provided by the
5 pharmacist.

6 Q. You relied on information by the
7 pharmacist? That's what you said?

8 A. We relied -- I'm sorry?

9 Q. Just so I understand what you're saying,
10 you said you relied on information provided by
11 the pharmacist?

12 A. We relied on information provided by the
13 pharmacist. We relied on information provided
14 by other people that I spoke to, who relied on
15 what other states were doing. We relied on
16 several things.

17 Q. Okay. Who are those other people that
18 you spoke to?

19 MR. MITCHELL: And pursuant to the
20 protective order, if you can answer without
21 identifying names.

22 THE WITNESS: Sure. So other
23 directors, other medical professionals, people
24 who were members of the team. I'm trying not
25 to -- make sure I'm careful here. That's

1 primarily it.

2 BY MR. KURSMAN:

3 Q. When you say medical professionals, what
4 type of medical professionals do you mean?

5 A. MDs, doctors, other people who would have
6 direct knowledge of protocols that were used in
7 other states.

8 Q. So when you consulted with doctors, were
9 they involved in the drafting of this protocol?

10 A. Not directly, no.

11 Q. Now, when you say not directly, what do
12 you mean by that?

13 A. Well, other than the conversations that I
14 had with them, the -- they did not sit down at
15 the table and help draft, directly, this
16 protocol, if that answers your question.

17 Q. Did you -- did you talk to any
18 anesthesiologists?

19 A. I did not.

20 Q. How about any pharmacologists?

21 A. I did not.

22 Q. Okay. What -- did the MD that you spoke
23 with have any specialty?

24 A. He was a general surgeon. He had
25 knowledge and experience in the use of

1 midazolam. Someone who I considered credible
2 and unbiased.

3 Q. And is this the same physician that
4 participates in the executions?

5 A. There was -- let me be clear. There are
6 multi -- there were multiple MDs that I spoke
7 to, okay? It's not just one. One of which
8 that I did talk to and consult with is a -- is
9 a participant in the process, yes.

10 Q. Okay. And is that the MD that pronounces
11 death?

12 A. Yes.

13 Q. Okay. And the MDs that you spoke to,
14 what did you speak to them about in relation to
15 the protocol?

16 A. Primarily the conversation was around the
17 drug midazolam.

18 Q. All right.

19 A. And the -- and the -- their thoughts and
20 opinion on midazolam. And their use and
21 observations of the effects of midazolam under
22 normal medical use in their practice, as well
23 as considering the current dosage that we use
24 and their opinion of how that would affect an
25 individual.

1 Q. Had any of the MDs that TDOC spoke to,
2 had any of them ever used 500 milligrams of
3 midazolam on a patient?

4 MR. MITCHELL: Object to the form and
5 also the scope of the notice.

6 You may answer.

7 THE WITNESS: Not that I'm aware of.

8 BY MR. KURSMAN:

9 Q. Do you know what the highest amount of
10 midazolam that any of the MDs had ever used on
11 a patient?

12 MR. MITCHELL: Same objections.

13 THE WITNESS: I do not, no.

14 BY MR. KURSMAN:

15 Q. Okay. And who actually wrote the
16 protocol?

17 MR. MITCHELL: Object pursuant to the
18 protective order.

19 You can answer, if you know.

20 THE WITNESS: The protocol was
21 written by the people that I mentioned prior,
22 the people who -- the chief legal counsel, as
23 well as other people who had input that I
24 mentioned before in drafting the protocol.

25 ///

1 BY MR. KURSMAN:

2 Q. Okay. Did different people write
3 different sections of the protocol?

4 A. They may have.

5 Q. Does TDOC not know whether different
6 people wrote different sections of the
7 protocol?

8 A. TDOC would not know specifically, not
9 without asking them -- those particular people
10 who may have written one paragraph or the
11 other. TDOC reviewed the entire protocol and
12 approved the protocol as written in its final
13 form.

14 Q. And what? I apologize.

15 A. I'm sorry?

16 Q. And what did you say? I apologize.

17 A. In its final form.

18 Q. In its final form?

19 A. Yeah, as we have it today.

20 Q. So if we go to the section of the
21 protocol that discusses the actual three-drug
22 execution procedure, who wrote that --

23 A. What page are you referring to?

24 Q. So that would be Exhibit 1, page 34.

25 A. And your question? I'm sorry. Your

1 question?

2 Q. Oh, I apologize.

3 Who wrote that section?

4 A. That section was written by the team.

5 I'm not certain who exactly typed that section
6 out. It was -- it was written based on
7 information that we had from the people that I
8 mentioned before.

9 Q. And that would be --

10 A. To include -- to include the pharmacist,
11 as well as members of the team that I had
12 mentioned previously.

13 Q. So would that be the drug procurer who
14 came up with this protocol, this --

15 A. The drug procurer would have had a part
16 in this. Again, in consultation with the
17 pharmacist, as well as -- also the other
18 members of the team would have had a -- would
19 have played into this also.

20 Q. Which other members of the team?

21 A. Again, the chief legal counsel, the
22 Attorney General's office. Primarily, though,
23 the drug procurer and the pharmacist.
24 Information that the drug procurer would have
25 received from the pharmacist.

1 Q. And did members of the team rely on maybe
2 the expertise of the drug procurer and the
3 pharmacist to come up with this three-drug
4 protocol?

5 A. I think the -- it played a part in that.
6 But also I will tell you that the use of
7 midazolam, vecuronium, and potassium was also
8 relied upon by myself in my conversations with
9 other directors that use the protocol, the
10 three-drug protocol.

11 Q. And how about -- how did you come up with
12 these exact numbers for each drug? Was that on
13 the advice of the pharmacist, or was that
14 something else?

15 A. I think it primarily -- as I recall on
16 the advice of -- in discussions with a
17 pharmacist, as well as other states' use of
18 these drugs and the amounts.

19 Q. What other states did you consider when
20 coming up with this protocol?

21 A. Virginia, Arkansas. I talked to several
22 states.

23 Q. What were the other states?

24 MR. MITCHELL: I'm going to object
25 pursuant to the protective order and instruct

1 the witness not the answer what -- what states
2 there were personnel in that he spoke with.

3 BY MR. KURSMAN:

4 Q. I just -- I'm just asking what other
5 protocols that you reviewed to come up with
6 this three-drug protocol or what other state
7 that you relied on.

8 A. Again, the states that I mentioned, as
9 well as the conversations that I had with other
10 directors. Alabama -- again, when I say this
11 -- I mean, you know who the directors are in
12 those states. So it's -- but again, Alabama,
13 Arkansas, Virginia, primarily.

14 Q. Did you rely on any medical texts?

15 A. Medical -- I'm sorry?

16 Q. Medical books. TDOC -- did TDOC read
17 any --

18 A. No, I did not.

19 Q. How about any medical articles?

20 A. No, I did not.

21 Q. Did you at TDOC look at past executions
22 gone wrong?

23 A. TDOC was aware of some executions that
24 was described in the media as botched
25 executions. And there was conversations that I

1 had with other directors related to that and
2 their thoughts on why those things happened
3 and was it directly related to the drug or a
4 mistake in the process. Or a -- for instance,
5 a bad vein or things that could have caused
6 that, other than the drug itself.

7 But -- I'm aware of that. But again,
8 I had discussions with several people related
9 to that.

10 Q. And when you discussed those prior --
11 what the media called botches, what did TDOC
12 conclude, whether it was as a result of the
13 drugs or mistakes?

14 A. Well, TDOC's conclusion was after
15 speaking with everyone, after considering the
16 information that we had, the best information
17 we had at the time was that the midazolam in
18 the dosage that we have listed here would be
19 sufficient to carry out an execution that was
20 humane and constitutionally -- met the
21 constitutional protections that an individual
22 deserves.

23 Q. Right.

24 But my question is, when you were
25 looking at the prior botches and you said you

1 discussed among TDOC whether that had to do
2 with the drugs themselves or mistakes made,
3 what did TDOC conclude? Did they -- did TDOC
4 conclude it was the drugs, or did TDOC conclude
5 it was mistakes made by individuals?

6 A. Well -- and again, the discussion that I
7 had with -- in conversations with other
8 directors was primarily that it was possible
9 that there was a flaw in the procedure. Not so
10 much the result of -- or the lack thereof but
11 result of the drug taking -- doing what it
12 should do on an individual, as far as making
13 them unconscious.

14 That was my interpretation and my --
15 my takeaway from those discussions. Not
16 necessarily a discussion I had with TDOC, but
17 the discussion I had with other people who I
18 trusted and relied upon as accurate. And
19 again, providing me relevant information at the
20 time.

21 Q. So what did TDOC do -- or did TDOC do
22 anything to ensure that those mistakes wouldn't
23 happen in Tennessee's execution protocol?

24 A. Well, there are procedures laid out in
25 the protocol that certainly speaks to that.

1 Safeguards. The use of trained EMTs to start
2 the IVs. Having observations of the injection
3 sites to ensure that there's no indications
4 from a physical or a visual standpoint that the
5 chemicals and the saline is being pushed into
6 the tissue versus a vein. Having multiple
7 views and multiple people viewing those sites.
8 Ensuring that there's a consciousness check.
9 There are several things.

10 Q. Would TDOC rather have EMTs pushing the
11 drugs than the executioner?

12 MR. MITCHELL: Object to the form.
13 And also outside the scope of the notice.

14 You can answer.

15 THE WITNESS: TDOC is satisfied that
16 the current process is sufficient to do the --
17 follow the execution protocol. So I would --
18 the answer would be no.

19 BY MR. KURSMAN:

20 Q. Okay. Would TDOC rather have a medical
21 professional or a pharmacist mix the drugs than
22 the executioner?

23 MR. MITCHELL: Same objection.

24 You may answer.

25 THE WITNESS: Again, TDOC is

1 satisfied with the current process. And we
2 would say no.

3 BY MR. KURSMAN:

4 Q. Did you consider any other execution
5 protocols when coming up with this current
6 protocol?

7 A. The protocol --

8 MR. MITCHELL: Object to the form.

9 But you can answer.

10 THE WITNESS: The protocol, it's --
11 the July 5, 2018, protocol was developed -- I
12 think it's fair to say that in developing this
13 protocol for lethal injection, we had to rely
14 on the chemicals that were available to us that
15 we could receive. Obviously, it's known that
16 we could not in any form or amount acquire
17 pentobarbital. We could not procure it. We
18 could not find the ingredients for it.

19 And so this protocol was developed
20 based on the information we had from the people
21 that I mentioned before, as well as my
22 discussions with other people in other states
23 who are using the three-drug protocol like
24 this, and the availability of the drugs at that
25 time.

1 BY MR. KURSMAN:

2 Q. And did -- aside from a one-drug
3 pentobarbital drug protocol and this current
4 three-drug protocol that TDOC has in place, did
5 TDOC consider any other protocols?

6 MR. MITCHELL: Same objection.

7 You can answer.

8 THE WITNESS: Yeah. Again, the
9 decision to go with this protocol with the
10 midazolam, vecuronium, and potassium chloride
11 was based on, again, our thoughts that it was
12 sufficient and that these were the drugs
13 available. So I would say that, no, we did not
14 seriously consider any other alternatives
15 because the means to carry out those other
16 alternatives were not available. And the fact
17 that we feel like this protocol is -- again, is
18 the best protocol that we have available and
19 are able to execute.

20 BY MR. KURSMAN:

21 Q. If TDOC -- strike that.

22 Would TDOC rather use a one-drug
23 pentobarbital protocol than the current
24 three-drug protocol?

25 MR. MITCHELL: Object to the form and

1 scope of the notice.

2 You can answer.

3 THE WITNESS: If TDOC had access to
4 pentobarbital, it's very possible that we would
5 seriously consider that as another option. So,
6 yes, it's possible.

7 BY MR. KURSMAN:

8 Q. Yes, it's possible; or, yes, TDOC would
9 rather use pentobarbital as its execution
10 protocol?

11 MR. MITCHELL: Same objections.

12 THE WITNESS: Well, again, I think
13 Tennessee would rather -- if we had access and
14 could acquire pentobarbital, yes, we would.
15 It's a one-drug protocol versus a three. But
16 again, it's not a viable option because we
17 don't have access to it. We can't get access
18 to it.

19 BY MR. KURSMAN:

20 Q. And can you tell me why the protocol was
21 changed from the one-drug pentobarbital
22 protocol to this current three-drug protocol?

23 A. Again --

24 MR. MITCHELL: I'm going to object to
25 the scope of the notice.

1 You can answer.

2 THE WITNESS: Because we could not
3 get access to pentobarbital in the state of
4 Tennessee.

5 BY MR. KURSMAN:

6 Q. And when TDOC says it could not get
7 access to pentobarbital, what is that based on?

8 A. It's based on our attempts as a
9 Department to gain access to pentobarbital both
10 from the drug procurer, as well as from myself
11 in communications with other corrections
12 directors, who at the time were currently using
13 pentobarbital, and my attempts to find a source
14 for pentobarbital.

15 Q. And when was the last time that you
16 personally attempted to find a source for
17 pentobarbital?

18 A. I don't remember. I don't remember
19 the -- and I'll clarify that a little bit. You
20 know, the conversations -- a common
21 conversation with directors and -- that have
22 execution protocols related to lethal injection
23 is pentobarbital. Even at a -- Correctional
24 Leaders Association, the association that most
25 correction directors belong to, they are aware

1 of the need or the desire for some states to
2 acquire pentobarbital. So that is a common --
3 that is a common thing that is there.

4 I don't know. It's -- I don't recall
5 the last conversation personally I had with a
6 director related to pentobarbital or the need
7 for -- or our desire for pentobarbital. I know
8 that it's a -- pretty much a standing request
9 between myself and the drug procurer that we
10 should -- you know, if we find a source for
11 pentobarbital, to certainly -- we would -- we
12 would want to know that.

13 BY MR. KURSMAN:

14 Q. So the -- just so I'm clear. The
15 instructions from TDOC to the drug procurer
16 are, keep looking for pentobarbital, keep
17 trying to get pentobarbital?

18 A. That's correct.

19 Q. All right. Okay. Let's go to page 6 of
20 Exhibit 1. Do you see that the very last
21 sentence is -- says it will be reviewed
22 annually or needed by a designated panel?

23 A. Yes.

24 Q. When was the last time that the protocol
25 was reviewed?

1 A. I think the protocol, I would say for the
2 last several years, has been under continuous
3 review, as far as the review of our lethal
4 injection protocol. It's reviewed -- been
5 multiple reviews.

6 Q. When was -- when was the last time it was
7 reviewed?

8 A. Oh --

9 Q. Let me -- I apologize. I didn't mean to
10 interrupt. Let me just back up.

11 So what does it mean to be reviewed?

12 A. That it be read by -- and reviewed by the
13 leadership team. When I say leadership team,
14 the assistant commissioner of prisons, the
15 chief legal counsel, the people in the
16 Department. The drug procurer, myself, on at
17 least the annual basis.

18 But to try to clarify that, I think
19 with the -- the amount of executions we've had
20 and the activity around lethal injection, this
21 manual has been reviewed on multiple occasions,
22 ongoing.

23 Q. Have you made any changes to the protocol
24 since July 5th, 2018?

25 A. No.

1 Q. And do you recall when the last time the
2 protocol was reviewed?

3 A. Again --

4 MR. MITCHELL: Object to the form.

5 You can answer.

6 THE WITNESS: Yeah. Again, I think
7 that the protocol is reviewed on an ongoing
8 basis. As far as a -- as far as a
9 particular -- everybody sitting around a table,
10 what's identified here as a panel review, no, I
11 do not.

12 BY MR. KURSMAN:

13 Q. Have you ever been involved in a panel
14 review of this execution protocol?

15 A. Other -- no. Again, not as a -- sitting
16 around a table, I reviewed the protocol several
17 times, as well as other -- the other members
18 that I've mentioned has reviewed the protocol.

19 Q. Does TDOC know whether a designated panel
20 has been reviewing this annually?

21 A. Other than the people I mentioned, the
22 assistant commissioner of prisons, the chief
23 legal counsel, myself, the drug procurer, no.
24 There's not -- there's not been an identified
25 list of individuals with a particular date that

1 we sat down and all around a table and went
2 over this as a group, no.

3 Q. At these reviews have you ever discussed
4 finding alternative methods of execution?

5 A. Again, other than what's been mentioned
6 related to our change from pentobarbital to the
7 three-drug protocol, no, I haven't.

8 Q. Okay. And just -- I think you testified
9 to this before. But who at TDOC procures
10 midazolam, vecuronium bromide, and potassium
11 chloride?

12 MR. MITCHELL: I'm going to object to
13 the form and pursuant to the protective order.

14 But you can answer.

15 THE WITNESS: We -- again, the person
16 who's been identified as the drug procurer is
17 responsible for communications with the
18 pharmacist that we have under the pharmacy
19 service agreement, as well as any other -- so
20 -- I'm sorry. Did that answer --

21 BY MR. KURSMAN:

22 Q. No, go ahead. I apologize. I didn't
23 mean -- I thought you were done.

24 A. The drug procurer, who is at the
25 Department.

1 Q. And could you describe the drug
2 procurer's process for obtaining midazolam?

3 A. Their direct communication with the
4 pharmacist who has the drug and provides the
5 drug to the Department for the purpose of
6 lethal injection in the Department as part of
7 the execution protocol. Again, most of that
8 communication, of course, is by phone. But
9 that's the process.

10 Q. And can you describe the drug procurer's
11 process for obtaining vecuronium bromide?

12 A. Again, their communication and the
13 authority of their job to contact on the
14 Department's behalf the pharmacist who procures
15 the drug, vecuronium bromide, from the
16 pharmacist.

17 Q. And is that the same process for
18 obtaining potassium chloride?

19 A. It is.

20 Q. So just so I'm clear, the process for
21 obtaining all three of these drugs is that the
22 drug procurer contacts the pharmacist, who
23 provide -- who then provides the drugs to TDOC?

24 A. That's correct.

25 Q. Okay. Is that the same process for

1 attempts to obtain pentobarbital?

2 A. It is. The drug procurer is responsible
3 for that. And also the drug procurer is --
4 again, has been tasked with, you know, any --
5 all attempts to find pentobarbital. If there
6 were a source that the drug procurer may be
7 aware of, a potential source, certainly they
8 would be able to reach out to that particular
9 -- potential source and inquire as to whether
10 or not a source of pentobarbital would be
11 available to the Department and would they be
12 willing to sell or to provide the pentobarbital
13 to the Department of Corrections for the
14 purpose of lethal injection.

15 Q. Does TDOC believe that the pharmacist who
16 is providing you with the three drugs for the
17 lethal injection protocol is making the same
18 efforts to find pentobarbital as they have made
19 to find the other three drugs?

20 MR. MITCHELL: Object to the form.

21 You can answer.

22 THE WITNESS: I think TDOC is under
23 the impression that under the current protocol
24 that they are responsible -- or that -- that
25 our request is to provide midazolam,

1 vecuronium, and potassium chloride. If the
2 pentobarbital is available, I think certainly
3 the drug procurer is aware that we would be
4 interested in having a conversation and
5 certainly seeing if it was possible to acquire
6 that drug.

7 So, yes, it's TDOC's belief that
8 there's an ongoing search. And that's
9 knowledge of the -- of the pharmacist.

10 BY MR. KURSMAN:

11 Q. Right.

12 Does TDOC think that the pharmacist
13 is doing as a robust of search for
14 pentobarbital as it is for midazolam? Does my
15 question make sense?

16 MR. MITCHELL: Object to the form.

17 But you can answer.

18 THE WITNESS: It would be hard for
19 me -- or for the Tennessee Department of
20 Corrections to say whether or not -- or what
21 the pharmacist may or may not be doing, as far
22 as what they believe or what -- certainly TDOC
23 -- again, it would be our desire for the
24 pharmacist, if pentobarbital was to be
25 available, to certainly make us aware of that

1 as an option.

2 BY MR. KURSMAN:

3 Q. What -- does TDOC want the pharmacist to
4 do as exhaustive as a search for pentobarbital
5 as it has done for midazolam?

6 MR. MITCHELL: I'm going to object to
7 the form and the scope of the notice.

8 You can answer.

9 THE WITNESS: So again, TDOC is --
10 the three-drug protocol that we currently use,
11 our priority is to make sure that we have
12 access to these three drugs. If pentobarbital
13 is available, it's something that we would want
14 to know.

15 As far as -- as far as the amount of
16 effort that goes into providing one drug versus
17 the other, I think TDOC's position would be
18 that currently we want to focus on the drugs
19 that we're currently using in this approved
20 protocol. But again, if pentobarbital is
21 available, we would want to know that.

22 BY MR. KURSMAN:

23 Q. So -- but my question is a little
24 different, which is, let's say the
25 pharmacist -- the drug procurer asks the

1 pharmacist to get midazolam. And the
2 pharmacist says, okay, I've contacted five
3 places, and it turns out I can get midazolam
4 from the fifth place. And the drug procurer
5 then says, I'll also look for pentobarbital --

6 A. Also look for what?

7 Q. Pentobarbital.

8 A. Okay.

9 Q. And the pharmacist says, okay, I looked
10 -- I looked at one place and they don't have
11 any pento. That means I can't get it.

12 Would it be TDOC's position that
13 that's sufficient -- a sufficient search? Or
14 does TDOC want the pharmacist to look -- doing
15 at least as robust -- as a robust search for
16 midazolam -- for pentobarbital as it's done for
17 midazolam?

18 MR. MITCHELL: And I'm going to,
19 again, object to the form and scope of the
20 notice.

21 You may answer.

22 THE WITNESS: Again, TDOC would want
23 the pharmacist to continue to look for
24 pentobarbital on an ongoing basis.

25 ///

1 BY MR. KURSMAN:

2 Q. Okay.

3 A. And I apologize. Can we take a
4 five-minute break?

5 Q. Sure. Absolutely.

6 A. Too much coffee and getting a little
7 older. I need...

8 THE VIDEOGRAPHER: One moment,
9 please. Going off the record at 11:16 a.m.

10 (Short break.)

11 THE VIDEOGRAPHER: Back on the record
12 at 11:25 a.m.

13 BY MR. KURSMAN:

14 Q. Commissioner Parker, let's go to Exhibit
15 6. Let me know when you're there.

16 A. I'm here.

17 Q. Okay. Do you see this e-mail,
18 September 7, 2017?

19 A. I do.

20 Q. Can you see it says, so the word from the
21 powers that be is that they first want to find
22 midazolam and then go from there, if there are
23 none out there to get.

24 A. I see that, yes.

25 Q. Okay. Have you seen this e-mail before

1 today?

2 A. I have.

3 Q. Okay. Do you know who wrote this e-mail?

4 A. I do not particularly, no.

5 Q. Okay. Was it somebody from TDOC?

6 A. I'm -- I believe so, yes.

7 Q. Okay. Did you -- when preparing for this
8 deposition, did you try to find out who wrote
9 this e-mail?

10 A. I did not necessarily try to find -- my
11 best recollection is that this would have
12 probably come from the drug procurer, but I'm
13 not 100 percent sure.

14 Q. Do you know who the powers that be are
15 that they are referring to in this e-mail?

16 A. I'm assuming they are referring to the
17 Commissioner of Corrections --

18 Q. Okay.

19 A. -- myself.

20 Q. Okay. And do you know why they first
21 wanted to try to find midazolam on September 7,
22 2017?

23 A. I think this was an attempt to find
24 midazolam for a three-drug protocol, once it
25 was obvious that pentobarbital was not

1 available.

2 Q. Did TDOC instruct the drug procurer at
3 this time to stop looking for pentobarbital?

4 A. No.

5 Q. Okay. Did TDOC instruct the drug
6 procurer to continue looking for pentobarbital?

7 A. Yes.

8 Q. Do you know why the drug procurer didn't
9 also ask the pharmacist to look for
10 pentobarbital in this e-mail?

11 A. I do not. Other -- I would say that
12 although pentobarbital is not mentioned here,
13 it's my understanding and TDOC's understanding
14 that the search for pentobarbital was ongoing
15 and consistent.

16 Q. Okay. Let's go to Exhibit 7. And do you
17 see on the next page -- page 2 of Exhibit 7 --
18 there's an e-mail that says, sent Thursday,
19 September 7 at 12:58 p.m. Do you see that one?
20 Second page.

21 A. I'm sorry. Let me get there.

22 Q. Sure.

23 A. You said September 7th at --

24 Q. 12:58.

25 A. 12:58 p.m.

1 Yes, I'm there.

2 Q. And do you see this is a responsive
3 e-mail to the e-mail that we just discussed?

4 A. Okay.

5 Q. Do you see it says, that stuff is readily
6 available along with potassium chloride. I
7 reviewed protocols from states that currently
8 use that method. Most have a three-drug
9 protocol including a paralytic and potassium
10 chloride.

11 A. I see that, yes.

12 Q. Do you know who this is from?

13 A. It's my belief that it's from the
14 individual at the pharmacy that the drug
15 procurer was communicating with at that time.

16 Q. Do you know what stuff they are talking
17 about when they say that stuff is readily
18 available?

19 A. I could only assume that it's midazolam.
20 But I -- again, I don't recall having any
21 personal conversations with the drug procurer
22 related to that.

23 Q. Do you -- do you know what protocols that
24 the pharmacist reviewed?

25 MR. MITCHELL: Object to the form.

1 You can answer.

2 THE WITNESS: I do not specifically
3 know, no.

4 BY MR. KURSMAN:

5 Q. Okay. And do you see that the pharmacist
6 also recommended a paralytic? What is a
7 paralytic?

8 MR. MITCHELL: Same objection.

9 You can answer.

10 THE WITNESS: Paralytic is -- an
11 example would be vecuronium that paralyzes the
12 subject.

13 BY MR. KURSMAN:

14 Q. Do you know why -- does TDOC know why
15 other states use a paralytic?

16 A. Other than it being part of their
17 execution protocol that is used to paralyze the
18 individual and stop the breathing of an
19 individual.

20 Q. So is the paralytic -- is it TDOC's
21 belief that a paralytic is used to end the
22 prisoner's life?

23 A. It is TDOC's belief that the paralytic is
24 used in conjunction with the other drugs to end
25 the individual's life. It hastens death, which

1 is the -- the object of the -- or the goal of
2 the -- of the execution protocol.

3 Q. Did TDOC ever discuss using only a
4 two-drug protocol and taking out the paralytic?

5 A. No. Our discussions were around the
6 three-drug protocol.

7 Q. And why did TDOC decide to use the
8 paralytic in the execution protocol?

9 A. The -- TDOC decided to use the three-drug
10 protocol with the paralytic based on
11 conversations that the commissioner had with
12 other states that were using the three-drug
13 protocol. That, as well as it was an
14 established method that, again, other states
15 were using. And that the Department had
16 confidence in relation to being able to provide
17 a process that was humane -- the most humane
18 and ensured the constitutional protections of
19 the inmate, based on the availability of the
20 sources we had.

21 Q. Does TDOC believe that a two-drug
22 protocol consisting of midazolam and potassium
23 chloride, does TDOC believe that that would end
24 the prisoner's life?

25 MR. MITCHELL: I'm going to object to

1 the form and the scope of the notice.

2 You may answer.

3 THE WITNESS: TDOC believes that,
4 yes, it would. But we would also state that we
5 believe the three-drug protocol that we're
6 currently using is the most appropriate method,
7 as I've stated before.

8 BY MR. KURSMAN:

9 Q. Okay. Can you explain why?

10 A. Again, the -- we believe that the
11 midazolam is adequate to render the person
12 unconscious. We believe that the paralytic,
13 again, aids in the death process, as far as
14 stopping the breathing of the individual. And
15 used in conjunction with the potassium chloride
16 that basically stops the heart, that it
17 achieves the goal of lethal injection.

18 Q. So is the purpose of the paralytic in
19 the -- in the lethal injection protocol to stop
20 the breathing of the individual?

21 A. I think the purpose of the paralytic,
22 again -- and I'm speaking about -- first of
23 all, I'm not a scientist. I'm not a medical
24 professional. But from the Department's point
25 of view, the paralytic is used in conjunction

1 with the other three drugs. And by the nature
2 of the drug itself and its purpose, is to
3 paralyze the individual and to stop the
4 breathing of the individual.

5 Q. What does TDOC believe the purpose of
6 paralyzing the individual would be?

7 A. Again, stopping the inmate's ability to
8 breathe, the -- which in conjunction with the
9 other three drugs, hastens the death process.
10 And again, ultimately ensuring the death of the
11 individual that's been sentenced to death by
12 the Court.

13 Q. Let's go back to the same exhibit, the
14 one...

15 MR. MITCHELL: I'm sorry. Can you
16 say that again?

17 MR. KURSMAN: Yeah, I apologize.

18 BY MR. KURSMAN:

19 Q. On Exhibit 7, the same e-mail that we
20 were just talking about at 12:58. And in the
21 middle of the paragraph, do you see it says --
22 the third line down -- it says, here's my
23 concern with midazolam. Being a
24 benzodiazepine, it does not elicit strong
25 analgesic effects. The subjects may be able to

1 feel pain from the administration of the second
2 and third drugs, potassium chloride especially.

3 Do you see that?

4 A. I do see that.

5 Q. Have you seen this e-mail before today?

6 A. I have seen this e-mail before.

7 Q. What did TDOC do with this e-mail?

8 MR. MITCHELL: Object to the form.

9 You can answer.

10 THE WITNESS: Let me make sure I
11 understand you. Are you -- are you asking what
12 consideration TDOC gave this e-mail?

13 BY MR. KURSMAN:

14 Q. Yes.

15 A. Okay.

16 Q. Thanks.

17 A. We considered the information as written
18 and as stated. That's what we did with it.

19 Q. Yeah. How did you consider the
20 information?

21 A. We consider this, obviously, the opinion
22 of the person who wrote the e-mail, who is --
23 who I'm assuming is a person that is associated
24 with the pharmacy that we purchase the drugs
25 from.

1 Does that answer your question?

2 Q. No.

3 My question is, how did you consider
4 that statement in this e-mail?

5 A. I considered it -- as the commissioner
6 and as TDOC, we considered it at its face
7 value --

8 Q. Do you --

9 A. -- of that person's opinion of
10 midazolam --

11 Q. Do you --

12 A. -- the use of midazolam.

13 Q. I apologize.

14 Did you discuss it with anyone else
15 at TDOC?

16 A. We could have discussed it -- I could
17 have discussed it as commissioner with the drug
18 procurer. I don't remember the exact
19 conversations. I know I considered this
20 information along with -- as I've testified
21 before, along with the information from other
22 sources that I considered reliable and that had
23 personal knowledge of midazolam's use in a
24 three-drug protocol for the purpose of the
25 execution. It was -- it was considered along

6 A. Not this particular e-mail itself. The
7 concept of midazolam -- the question of
8 midazolam being sufficient to render someone
9 unconscious and unable to feel pain, that was a
10 consideration that I discussed with the people
11 that I mentioned previously, as -- and their
12 observations and opinions related to that
13 particular opinion that's stated here.

14 Q. Did any individuals at TDOC have a
15 follow-up conversation with this person who
16 wrote this e-mail to understand what they meant
17 that being a -- being a benzodiazepine does not
18 elicit strong analgesic effects and the
19 subjects may be able to feel pain from the
20 second and third drugs?

21 | A. I'm not aware of that.

22 MR. MITCHELL: Object to the form and
23 the scope of the notice.

24 You may answer. Sorry.

25 | *///*

1 BY MR. KURSMAN:

2 Q. Was there any discussion about searching
3 for an additional drug that might elicit strong
4 analgesic effects?

5 A. I give no instructions for that. Again,
6 based on -- in considering what was said here,
7 as well as the other individuals that I spoke
8 to, the decision was made to use midazolam.

9 Q. Does TDOC know what the term analgesic
10 effects means?

11 A. Yes.

12 Q. Okay. And what does it mean?

13 A. It is related to the effects on an
14 individual not to feel pain.

15 Q. And was -- and is TDOC aware that
16 midazolam does not elicit strong analgesic
17 effects?

18 A. TDOC is aware that there is mixed
19 professional opinions on that. I think if you
20 talk to expert witnesses on the use of
21 midazolam, you'll have people -- some who say
22 that it does, and some who say that it does
23 not. So we're aware of both of those opinions.

24 Q. And after receiving this e-mail -- I
25 think you've already said you did not show it

1 to a doctor. Did you show it to a
2 pharmacologist?

3 A. No.

4 MR. MITCHELL: And I'm going to
5 object to the scope of the notice. But the
6 answer stands.

7 BY MR. KURSMAN:

8 Q. And after receiving this e-mail, was
9 there any discussion at TDOC about searching
10 for any additional drugs?

11 A. Other than pentobarbital, no.

12 Q. And then do you see the e-mail continues,
13 it says, consider the use of an alternative
14 like ketamine or use in conjunction with an
15 opioid.

16 Do you see that?

17 A. I do see that.

18 Q. Did you do that?

19 MR. MITCHELL: I'm going to object to
20 the scope of the notice, as well as object to
21 the form.

22 You can answer.

23 THE WITNESS: As far as considering
24 the use of an alternative like ketamine or the
25 use in conjunction with an opioid, no. The

1 decision was made to use the three-drug
2 protocol that was currently being used and that
3 TDOC considered reliable in carrying out the
4 lethal injection process.

5 BY MR. KURSMAN:

6 Q. Okay. So just so I'm clear, TDOC did not
7 attempt to obtain ketamine, right?

8 A. Not that I -- not to my knowledge.

9 MR. MITCHELL: Same objections.

10 BY MR. KURSMAN:

11 Q. TDOC did not attempt to obtain other
12 drugs, aside from the three drugs in the
13 protocol and pentobarbital?

14 MR. MITCHELL: Same objections.

15 THE WITNESS: That's correct.

16 BY MR. KURSMAN:

17 Q. Okay. Why didn't TDOC attempt to obtain
18 any other drugs, aside from those four drugs we
19 just discussed?

20 MR. MITCHELL: Same objections. Form
21 and scope of the notice.

22 You can answer.

23 THE WITNESS: Again, TDOC was
24 confident that the three-drug protocol, as
25 listed here in our current protocol, was

1 sufficient based on the drugs that were
2 relied -- that we could attain and that were
3 currently being used in the execution process
4 in other states, as well as the conversations
5 that the commissioner had with other directors
6 who were using this protocol successfully.

7 BY MR. KURSMAN:

8 Q. Is TDOC aware that the pharmacist who
9 supplies TDOC with execution drugs believes
10 that midazolam will not render the prisoners
11 insensate to the second and third drugs?

12 MR. MITCHELL: I'm going to object to
13 the form, scope of the notice.

14 You may answer.

15 THE WITNESS: I'm sorry. Repeat
16 that. I'm sorry.

17 BY MR. KURSMAN:

18 Q. Sure.

19 Is TDOC aware that the pharmacist who
20 supplies TDOC with the drugs believes that
21 midazolam will not render the prisoners
22 insensate to the second and third drugs?

23 MR. MITCHELL: Same objections.

24 You may answer.

25 THE WITNESS: I'm not -- the

1 Department's not.

2 BY MR. KURSMAN:

3 Q. And what would the Department do if they
4 found out about that opinion from the
5 pharmacist?

6 MR. MITCHELL: Object to the form and
7 the scope of the notice.

8 You can answer.

9 THE WITNESS: I think -- again, the
10 Department of Corrections is confident that the
11 three-drug protocol we use is the best
12 protocol, based on the availability of the
13 drugs that we have access to, as well as our
14 use of this three-drug protocol on two
15 occasions that, frankly, has built our
16 confidence in the three-drug protocol that we
17 currently use.

18 BY MR. KURSMAN:

19 Q. If we go back to Exhibit 7, that sentence
20 we were just talking about, being a
21 benzodiazapine, it does not elicit strong
22 analgesic effects. Why did TDOC decide to
23 reject this opinion?

24 A. I'm sorry, sir? I didn't understand your
25 question.

1 Q. Sure.

2 So the pharmacist e-mails TDOC, a
3 member of TDOC, and says, look, I have concerns
4 midazolam -- that under this protocol the
5 prisoners could feel the effects of the second
6 and third drugs. Why did TDOC reject this
7 opinion?

8 A. I don't know that we rejected the
9 opinion. I think we -- I think TDOC took this
10 into consideration, along with the other
11 information that we had at the time, and made a
12 decision based on not just one e-mail but the
13 total scope of the information that TDOC had to
14 make a decision on a three-drug protocol.

15 Q. So does TDOC believe that this opinion
16 could be correct?

17 A. I think --

18 MR. MITCHELL: I'm going to object to
19 the scope of the notice and also the form.

20 You can answer.

21 THE WITNESS: I think TDOC would
22 acknowledge that there are those people who
23 have the sincere opinion that midazolam does
24 not render someone insensate, as well as people
25 and professional opinions who believe that it

1 does. And we acknowledge that, I think.

2 But we also acknowledge that it's
3 relevant, what we have personally seen using
4 this three-drug protocol, as well as the
5 conversations of other directors that currently
6 use this three-drug protocol successfully with
7 no issues, as well as TDOC's history with this
8 three-drug protocol, that it is, again, the
9 best protocol that we have available at this
10 time.

11 BY MR. KURSMAN:

12 Q. When you say use successfully, what do
13 you mean by that?

14 A. To carry out lethal injection on an
15 individual that has been sentenced to death in
16 the state of Tennessee. To render the person
17 dead.

18 Q. Okay. So TDOC's opinion of a successful
19 execution is a rendering a person dead?

20 MR. MITCHELL: I'm going to object to
21 the form and scope of the notice.

22 You may answer.

23 THE WITNESS: Well, I've said this
24 before. TDOC is -- is -- our opinion is to
25 ensure that we do the best we can to carry out

1 the orders of the Court, which is death, in the
2 most humane and constitutionally protected
3 method that we have available to us. That's
4 our -- that's our goal, and that's our
5 priority.

6 BY MR. KURSMAN:

7 Q. And can you describe to me how the use of
8 a -- the second drug in this execution
9 protocol, in TDOC's opinion, would make the
10 execution more humane than just using midazolam
11 and potassium chloride?

12 MR. MITCHELL: And same objections.
13 Form and scope of the notice.

14 You may answer.

15 THE WITNESS: I think the second
16 drug, the vecuronium, again, it's a paralytic
17 that -- I've said this before. It hastens the
18 death process. It stops the breathing. It
19 paralyzes the individual. And that is -- that
20 is why it's important in this protocol.

21 BY MR. KURSMAN:

22 Q. Is TDOC aware that the paralytic also
23 disallows the prisoner to move at all, even if
24 the prisoner can feel pain?

25 MR. MITCHELL: Again, I object to the

1 form and the scope of the notice.

2 You can answer.

3 THE WITNESS: TDOC is aware that it
4 paralyzes the individual, yes.

5 BY MR. KURSMAN:

6 Q. But is TDOC aware that that means that
7 the individual will not be able to signal that
8 he or she feels pain from the second or third
9 drugs because they will be paralyzed?

10 MR. MITCHELL: Same objections.

11 THE WITNESS: TDOC is aware that an
12 individual who is paralyzed obviously couldn't
13 raise his hand or do anything like that or --
14 yes. So, yes, we're aware of that.

15 BY MR. KURSMAN:

16 Q. Okay. Let's go to Exhibit 8. And do you
17 see this as another e-mail on the same date,
18 September 7th, 2017? And it's at 1:39?

19 A. Yes.

20 Q. And do you see it says, etomidate,
21 limited supply; ketamine, ample supply, at the
22 very top.

23 A. Yes, I do see that.

24 Q. This is an e-mail from the pharmacy to
25 TDOC as well, right?

1 A. I understand that to be the case, yes.

2 Q. Why is the pharmacy e-mailing TDOC about
3 its supply of etomidate and ketamine?

4 MR. MITCHELL: Object to the form and
5 scope of the notice.

6 You can answer.

7 THE WITNESS: I have no knowledge of
8 that. I wouldn't be able to answer that.

9 BY MR. KURSMAN:

10 Q. Did you ask anyone at TDOC in preparation
11 for this deposition why the pharmacy would have
12 e-mailed about their supply of etomidate and
13 ketamine?

14 MR. MITCHELL: Same objections.

15 You can answer.

16 THE WITNESS: I did not.

17 BY MR. KURSMAN:

18 Q. Have you ever seen this e-mail before
19 today?

20 A. Not that I recall.

21 Q. Had you known --

22 A. I --

23 Q. I apologize.

24 A. I want to be clear. Again, this is --

25 goes back several years. And I've slept since

1 then, so it's possible I could have in the
2 past. But I don't -- sitting here today, I
3 don't recall personally seeing that.

4 Q. Sure.

5 Had TDOC known that the pharmacy
6 could have supplied it with etomidate, would
7 have TDOC purchased etomidate from the
8 pharmacy?

9 MR. MITCHELL: Objection to the form
10 and the scope of the notice.

11 You can answer.

12 THE WITNESS: TDOC was moving forward
13 with a three-drug protocol with midazolam,
14 vecuronium, and potassium chloride. And TDOC
15 was satisfied that, again, that was the best
16 option that we had for a three-drug protocol.

17 I don't know what context this may
18 have been sent to the individual it was sent
19 to. It could have been a question that they
20 could have been providing this just as FYI. I
21 don't know.

22 But to try to answer your question
23 again, the Department of Corrections was moving
24 forward with the three-drug protocol of
25 midazolam, vecuronium, and potassium chloride.

1 BY MR. KURSMAN:

2 Q. And is that the same answer for why TDOC
3 did not attempt to get ketamine as well?

4 A. Yes.

5 MR. MITCHELL: Same objections.

6 BY MR. KURSMAN:

7 Q. Okay. Let me ask you this. The
8 pharmacist says, consider getting an analgesic.

9 If TDOC's position is to have the
10 most humane execution, why not just get an
11 analgesic and give that to the prisoner as
12 well?

13 MR. MITCHELL: Objection to the form
14 and the scope of the notice.

15 You can answer.

16 THE WITNESS: So again, it's our
17 belief that the current system that's being
18 used is the most appropriate and most humane
19 method that we can provide, based on what's
20 being used in other states with the three-drug
21 protocol, as well as our being available to
22 obtain the drugs necessary from a supplier for
23 executions in the Department of Corrections.

24 BY MR. KURSMAN:

25 Q. Right.

1 But previously you testified that
2 it's TDOC's position that there are some
3 experts that believe the administration of the
4 first drug will make the prisoners insensate to
5 the second or third drugs or at least
6 unconscious before receiving -- before
7 receiving the second or third drugs. And then
8 there's some experts who believe that the
9 prisoners will feel the second and third drugs
10 after they get the midazolam.

11 Why not -- because there's this --
12 TDOC has received this conflicting information,
13 why not attempt to get an analgesic, so that
14 whether you are on either side, you can say,
15 hey, we satisfied your concerns?

16 MR. MITCHELL: And again, object to
17 the form and scope of the notice.

18 You can answer.

19 THE WITNESS: Other than to say that
20 the decisions that were made to go with the
21 three-drug protocol from the Department's
22 standpoint, that the information that the
23 Department relied upon, as well as our
24 observations of the current three-drug
25 protocol, were satisfied that the inmate is

1 unconscious and insensate to pain and that we
2 are providing the most appropriate method,
3 based on the availability of the drugs that we
4 can find.

5 BY MR. KURSMAN:

6 Q. And when you say your observations, can
7 you describe your observations?

8 A. I mean, our observations of the two
9 lethal injection processes that we used this
10 three-drug protocol in, so.

11 Q. Right.

12 And what I mean is, what did TDOC
13 witness to make them more confident that this
14 three-drug execution protocol is humane?

15 MR. MITCHELL: Objection to the form.
16 Scope of the notice.

17 You can answer.

18 THE WITNESS: The executions of Irick
19 and Johnson and the observations of the inmate
20 after the midazolam was onboard, the
21 consciousness check that was conducted by the
22 warden, and the inmate's response to the
23 three-drug protocol.

24 BY MR. KURSMAN:

25 Q. Does TDOC believe the inmate would have

1 been in a better position to respond had it
2 only been a two-drug protocol rather than a
3 three-drug protocol?

4 MR. MITCHELL: Same objections.
5 You can answer.

6 THE WITNESS: TDOC acknowledges that
7 the paralytic could affect the inmate's ability
8 to respond once the vecuronium is onboard, but
9 obviously we're satisfied that the midazolam --
10 the 500 milligram of midazolam onboard the
11 individual rendered them unconscious and
12 insensate to pain.

13 BY MR. KURSMAN:

14 Q. Does TDOC have any e-mail correspondence
15 with any other pharmacies aside from the
16 pharmacy who is supplying you with lethal
17 injection chemicals?

18 A. Not that we're aware of.

19 MR. MITCHELL: Yeah. Object on the
20 form and scope of the notice.

21 BY MR. KURSMAN:

22 Q. And why wouldn't you have correspondence
23 with the other pharmacies?

24 MR. MITCHELL: Same objections.

25 THE WITNESS: I don't know.

1 BY MR. KURSMAN:

2 Q. Is that TDOC doesn't know?

3 (Reporter clarification.)

4 MR. MITCHELL: Same objections.

5 THE WITNESS: Yeah, I would not know.

6 BY MR. KURSMAN:

7 Q. Well, are you looking -- is TDOC looking
8 for pentobarbital through any other pharmacies,
9 aside from the pharmacist that supplies you
10 with midazolam?

11 A. TDOC has instructed the drug procurer to,
12 again, have a -- there's a continuous effort to
13 look for pentobarbital. That could be through
14 the current provider, as well as other
15 providers or potential providers.

16 Q. Let's go to Exhibit 9. Go to the second
17 page in Exhibit 9. Do you see it says, so the
18 word from the powers that be is that we want to
19 move forward with ordering the items for a
20 three-drug protocol, including midazolam?

21 A. I see that.

22 Q. Yeah.

23 And do you see this is an e-mail from
24 September 21st, 2017?

25 A. I do, yes.

1 Q. So this is after the e-mail from the
2 pharmacist regarding midazolam's analgesic
3 effects, right, that was on September 7, 2017?

4 A. That's correct.

5 Q. Why -- well, after -- between these two
6 e-mails, did anyone at TDOC have discussions
7 about attempting to look for different drugs
8 based on that September 7th e-mail?

9 MR. MITCHELL: Object to the form and
10 also the scope of the notice.

11 THE WITNESS: TDOC -- it's fair to
12 say that TDOC considered the information, as
13 I've said earlier, in the original e-mail
14 that -- the September 7th e-mail -- sorry. Let
15 me verify. Yeah, the September 7th e-mail and
16 made the decision to move forward with
17 midazolam.

18 I'm sorry. I don't remember your
19 exact question but...

20 BY MR. KURSMAN:

21 Q. I think that answers it.

22 A. Yeah.

23 Q. Do you see that in the -- in the second
24 paragraph, where it says, for each inmate we
25 would have to have a backup dosage of those?

1 A. I see that, yes.

2 Q. Is that for all three drugs in the
3 protocol?

4 A. So I'm assuming there that's the second
5 dose of -- the blue set. The backup set.

6 Q. And why are backup doses necessary?

7 A. The backup doses are necessary, for
8 instance, if you have -- during the process if
9 you have to switch from the left arm to the
10 right arm because of a blown vein. Or there's
11 any issue with the first round of drugs, you --
12 the protocol instructs the executioner and the
13 warden to switch to the second set of drugs.

14 MR. KURSMAN: Could we take a break
15 here?

16 MR. MITCHELL: Sure.

17 THE VIDEOGRAPHER: One moment,
18 please. Going off record at 12:01 p.m.

19 (Short break.)

20 THE VIDEOGRAPHER: Back on the record
21 at 12:44 p.m.

22 BY MR. KURSMAN:

23 Q. While we were on break, is there anything
24 that you thought of that you would like to
25 change your answer to earlier?

1 A. No.

2 Q. Okay. Let's go to -- do you have the
3 exhibits in front of you?

4 A. I do.

5 Q. Okay. Great.

6 Let's go to Exhibit 10. Do you see
7 this says, I'm inquiring as to whether your
8 organization has an inventory of pentobarbital?

9 A. Yes.

10 Q. Okay. Do you know if this was written by
11 an employee of TDOC?

12 A. I do not personally know. No, I don't.
13 I don't know.

14 Q. Okay. Let's go to Exhibit 11. Do you
15 see the second e-mail down is at 10:37 a.m. on
16 April 6, 2017?

17 A. Yes.

18 Q. It says, word I'm getting from the
19 pharmacist is that we would need USP grade.
20 And asking if the pentobarbital comes in
21 crystalline form for bulk orders to be used to
22 compound.

23 A. I see that, yes.

24 Q. Do you know who wrote this e-mail?

25 A. I do not.

1 Q. Do you know why you would need USP grade
2 pentobarbital?

3 A. I do not.

4 Q. Is TDOC only looking for USP grade
5 pentobarbital?

6 A. TDOC is looking for pentobarbital in any
7 form, commercially manufactured or compounded.

8 Q. And let's turn to Exhibit 12. And do you
9 see that the second e-mail says, I am looking
10 to purchase pentobarbital. We would need at
11 least 100 grams to start with.

12 A. I see that.

13 Q. Do you know if this e-mail is from an
14 employee from TDOC?

15 A. I do not know. I would assume that it
16 is, but I do not know for sure.

17 Q. Okay. Has TDOC instructed its drug
18 procurer to look for pentobarbital -- to only
19 look for at least a hundred grams?

20 A. TDOC has instructed the pharmacist and
21 the drug procurer to look for any amount of
22 pentobarbital --

23 Q. Okay. So you --

24 A. -- sufficient to carry out an execution.

25 Q. I apologize for interrupting.

1 Do you know why the drug procurer
2 would then say we would need at least 100 grams
3 to start with?

4 A. I do not.

5 Q. 100 grams would be enough for 20
6 executions, right?

7 A. I believe that's correct.

8 Q. Okay. So if a pharmacy could provide you
9 with 25 grams, would TDOC accept those 25 grams
10 of pentobarbital?

11 MR. MITCHELL: Object to the form and
12 scope of the notice.

13 You can answer.

14 THE WITNESS: TDOC would accept any
15 amount that would be adequate to carry out an
16 execution in any form, whether it be
17 manufactured or compound.

18 BY MR. KURSMAN:

19 Q. Okay. Let's go to --

20 A. And --

21 Q. Go ahead. I'm sorry.

22 A. No, you -- I'm sorry. Go ahead.

23 Q. Let's go to Exhibit 13. Do you see this
24 from July 20th, 2017?

25 A. Yes.

1 Q. And it says, I have some news on the
2 pento. It's not good. I had the DEA invite me
3 over to discuss it. I can call you tomorrow to
4 fill you in on the details.

5 Do you see that?

6 A. I do.

7 Q. Do you know who this e-mail is from?

8 A. Not personally, no, I do not.

9 Q. Do you know who it was to?

10 A. I do not. I'm assuming it was to the
11 drug procurer, but I'm not --

12 Q. Have you seen this e-mail before today?

13 A. Not that I recall.

14 Q. Do you know if anyone from TDOC had a
15 phone conversation to discuss the meeting with
16 the DEA?

17 MR. MITCHELL: Object to the form and
18 scope of the notice.

19 You can answer.

20 THE WITNESS: TDOC does not -- I --
21 we do not recall any recollection of that. Not
22 to say that it could not have happened -- the
23 drug procurer particularly -- but we have no
24 knowledge of that.

25 ///

1 BY MR. KURSMAN:

2 Q. What is TDOC's understanding of the DEA's
3 involvement today on a state's ability to
4 import pentobarbital?

5 MR. MITCHELL: Same objections.

6 You may answer.

7 THE WITNESS: TDOC's understanding is
8 that the DEA has strictly regulated and
9 prohibited that in other states, where other
10 states have attempted to get pentobarbital from
11 other countries sent in and -- because of a
12 regulation that there is a supply of
13 pentobarbital in the United States. So,
14 therefore, they -- it would not be required to
15 be brought in from another country.

16 Of course, the argument is there
17 that, supply may be here, but it's not a supply
18 that would be available to corrections when
19 they request it.

20 BY MR. KURSMAN:

21 Q. Did anybody talk to the DEA about that,
22 what you just said from TDOC about they can't
23 get the supply in the United States?

24 MR. MITCHELL: Same objections.

25 You can answer.

1 THE WITNESS: It's the -- it's our
2 understanding that this was a -- the fact that
3 the DEA was involved and prohibited the drug
4 from coming outside the country into the
5 country for the use of executions, that was
6 a -- something that was known in several states
7 by commissioners, as well as I'm assuming the
8 pharmacist and the drug procurer for the state
9 of Tennessee.

10 BY MR. KURSMAN:

11 Q. Has anyone from TDOC reached out to the
12 DEA since 2017 to see if their stance has
13 changed?

14 A. Not to my knowledge.

15 MR. MITCHELL: And again, the form
16 objections and beyond the scope of the notice.

17 THE WITNESS: Not to my knowledge.

18 BY MR. KURSMAN:

19 Q. And when you say not to your knowledge,
20 do you mean not to TDOC's knowledge?

21 A. Not to TDOC's knowledge.

22 Q. Okay. Let's go to Exhibit 14. Do you
23 see these are handwritten notes?

24 A. Yes.

25 Q. Okay. Have you seen these notes before?

1 A. No.

2 Q. So you don't know who wrote these notes?

3 A. No.

4 Q. Can we go to the second page of this
5 exhibit. Do you see it says, plenty in Europe
6 and available according. And then it says --
7 redacted -- has it. No lawyers.

8 Do you see that?

9 A. I do see that.

10 Q. Do you know what that means?

11 A. No, I do not.

12 Q. Okay. Were -- was TDOC aware that it
13 could obtain pentobarbital in Europe?

14 MR. MITCHELL: Object to the form.

15 THE WITNESS: No.

16 BY MR. KURSMAN:

17 Q. Okay. Has TDOC attempted to get
18 pentobarbital in Europe?

19 A. Again, TDOC has attempted -- or the
20 request for pentobarbital was not specific to
21 any one location, state, or country. It was a
22 search for pentobarbital, regardless.

23 As far as TDOC reaching out directly
24 to Europe, I have no knowledge of that or --
25 whatsoever.

1 Q. Well, who did TDOC contact to get
2 pentobarbital, aside from the current pharmacy
3 that you're working with now?

4 A. Again, the drug procurer would have
5 reached out to the current pharmacy that we're
6 working with and other individuals also --
7 other pharmacies, I'm assuming, also. So it
8 wasn't limited to just one service.

9 Q. Do you know who was -- any pharmacies in
10 Europe?

11 A. Not that I'm aware of.

12 Q. Okay. And at this time do you know
13 whether you had a compounding pharmacy that was
14 able to compound pentobarbital -- pentobarbital
15 as an active pharmaceutical ingredient?

16 A. It's my understanding at one time we did,
17 yes.

18 Q. And do you know if the current pharmacy
19 that provides you with the lethal injection
20 chemicals would compound pentobarbital's active
21 pharmaceutical ingredient?

22 A. I'm not one hundred percent sure. But
23 since it's the same pharmacy we used before,
24 I'm assuming they are still capable of
25 compounding pentobarbital.

1 Q. Let's go to Exhibit 16. And you see this
2 is a PowerPoint?

3 A. Yes.

4 Q. Have you seen this PowerPoint before?

5 A. I have.

6 Q. Do you know who created it?

7 A. The Department of Corrections created
8 this PowerPoint.

9 Q. Do you know who at the Department of
10 Corrections created the PowerPoint?

11 A. The PowerPoint was created specifically
12 by the administration of the Department. So it
13 would be people who work for me as a
14 commissioner, as well as input from general
15 counsel and others.

16 Q. And who would that be, without disclosing
17 any identities?

18 A. General counsel, drug procurer,
19 commissioner's office, possibly the Attorney
20 General's office, and anyone else who would
21 have had direct knowledge of the subject
22 matter, which primarily the people that I've
23 mentioned.

24 Q. And do you know who that was presented
25 to?

1 A. It was presented to the -- the Governor's
2 office, the administration at the time.

3 Q. And would you in your individual capacity
4 be part of that office?

5 MR. MITCHELL: I'm going to -- I'm
6 going to object to the form and the scope of
7 the notice.

8 You can answer.

9 You said Governor's office?

10 MR. KURSMAN: Yeah.

11 MR. MITCHELL: Individual capacity?

12 MR. KURSMAN: With the -- with the
13 commissioner being one of the participants that
14 this was presented to, is the question.

15 MR. MITCHELL: Okay.

16 THE WITNESS: Yes.

17 BY MR. KURSMAN:

18 Q. Okay. And who else, without revealing
19 any identities, was in attendance when this was
20 presented?

21 A. To the best of my recollection, the chief
22 legal counsel, members from the Attorney
23 General's office, the Governor's office, the
24 legal counsel for the Governor at the time.

25 Q. Do you know why this PowerPoint was

1 created?

2 A. It was created to inform the Governor
3 when the current process of the death penalty
4 process in Tennessee -- kind of where we were
5 at in the process of looking forward to
6 potential upcoming executions.

7 Q. Did the Governor ask for this to be
8 created?

9 MR. MITCHELL: I'm going to object to
10 the form and scope of the notice.

11 THE WITNESS: I don't recall that the
12 Governor specifically asked for this to be
13 created. The Department did this to make sure
14 that we were staying in communication with the
15 Governor's office and they were aware of where
16 we were at within the Department.

17 BY MR. KURSMAN:

18 Q. Okay. And where were you at, at that
19 time that this was created?

20 A. So -- well, it's -- a lot of it's
21 included in this PowerPoint, as to where we
22 were at. There was discussion about the number
23 of inmates on death row. Obviously where they
24 were located. We covered the law on
25 alternative means to execution. What

1 Tennessee's protocol was with the
2 pentobarbital.

3 I mean, there's a lot of information
4 in here. Do you have a specific --

5 Q. Yeah, and I apologize for that.

6 At this point before the protocol --
7 or before the PowerPoint was presented, was
8 TDOC at that point thinking that they wanted to
9 change to the three-drug protocol?

10 A. TDOC was concerned that pentobarbital was
11 not going to be available and that we couldn't
12 find pentobarbital.

13 Q. So did --

14 A. And that there was a -- there was a --
15 there was a -- that was our understanding. And
16 wanted to make sure that the administration
17 knew that and -- as well as our process of
18 looking for alternatives to the current
19 protocol if the pentobarbital was not
20 available.

21 Q. And was TDOC considering any alternatives
22 aside from the current three-drug protocol?

23 A. Initially. When we realized that
24 pentobarbital was not available, we were not
25 able to get it. We were facing the possibility

1 of upcoming executions, of course. We began
2 the process, as I've described earlier today,
3 of how we developed the three-drug protocol.
4 That is the same process as -- to answer the
5 question that you just asked me.

6 Q. Right. I'm sorry. Maybe my question is
7 a little unclear.

8 That process of coming up with that
9 three-drug protocol, did that process begin
10 before August 31st, 2017, the date of this
11 PowerPoint?

12 A. I think it was -- I think the -- the
13 Department of Corrections realized that we were
14 approaching a time period where an alternative
15 to the one-drug protocol was going to be
16 necessary. Because after exhaustive attempts
17 we could not find the pentobarbital. It was --
18 it was our realization that we were not going
19 to be able to find it. Although we continued
20 to look for it, that we had to establish
21 another alternative. And it would have been
22 close to this time that we realized.

23 But the effort certainly started
24 after this and continued on until we
25 established the three-drug protocol.

1 Q. So after this was presented to the
2 Governor and the Governor's office, was it the
3 Governor's office that instructed TDOC, okay,
4 look for midazolam?

5 MR. MITCHELL: I'm going to object to
6 the form and the scope of the notice. And also
7 based on the deliberative process privilege and
8 instruct the witness not to answer. And, I
9 guess, executive privilege.

10 BY MR. KURSMAN:

11 Q. Let's go to page 8. I'm sorry, page 7 of
12 the -- sorry, page 8. I apologize.

13 Do you see it says, reached out to
14 blank because it was understood they had a
15 source for pentobarbital?

16 A. I see that.

17 Q. Do you see that on page 8?

18 Is blank a state?

19 A. Yes.

20 Q. Okay. How many states did the Department
21 of Corrections reach out to who had a source of
22 pentobarbital?

23 MR. MITCHELL: I'm going to object to
24 the form.

25 But you can answer.

1 THE WITNESS: We reached out to two
2 states, as well as -- as well as the
3 association that represents all state
4 corrections in America to attempt to find
5 someone who had a current source for
6 pentobarbital, who was willing to provide
7 contact information that we might reach out to
8 a pharmacist that -- to inquire as to whether
9 or not they would provide that to Tennessee.

10 BY MR. KURSMAN:

11 Q. Why were these states unwilling to share
12 this information?

13 MR. MITCHELL: I'm going to object to
14 the form and the scope of the notice.

15 You can answer.

16 THE WITNESS: It's the State's
17 understanding that some of the pharmacies were
18 very hesitant to expand providing pentobarbital
19 to other states for different reasons. And the
20 state departments of corrections in those
21 states did not want to take a chance of losing
22 their source and putting them in the same
23 situation as -- at the current time that
24 Tennessee was in, with not being able to find
25 pentobarbital.

1 BY MR. KURSMAN:

2 Q. Why did Tennessee stop at two states?

3 A. I don't know that Tennessee stopped at
4 two. I said two. I can recall two specific
5 states right now. Again, the request was
6 there, both from the drug procurer and the
7 commissioner's communication with other
8 corrections commissioners, as well as the
9 association that represents us to make every
10 attempt to find pentobarbital at any location.

11 Q. And what was your conversation with this
12 association that represents all departments of
13 corrections?

14 A. My conversation was that, can you assist
15 in any way of finding a source of pentobarbital
16 for the use of lethal injection in the state of
17 Tennessee, either from another correction or
18 from another contact that might know a pharmacy
19 that would provide it and be willing to provide
20 it.

21 Q. And what was the response that you
22 received?

23 A. The response was, is that they would do
24 everything in their power to assist. They
25 would contact me if they had a source or a

1 potential source or a number or a contact that
2 we could reach out to. And there was multiple
3 communications between myself and the
4 association's director to follow up on that.

5 Q. What did you discuss during these
6 multiple conversations?

7 A. Again, is there a source. Have you found
8 a source. Has another director, you know, come
9 forth willing to help -- help us. Even -- even
10 to the point that as a director -- let's use
11 for example -- let's just say Kentucky. If
12 Kentucky had a source and they did not want to
13 come forth and say this is Kentucky providing
14 this information, they could go to the
15 executive director, provide that -- you know,
16 here's a number of a pharmacy that might be
17 willing to provide it. And Tennessee can reach
18 out to them, and I don't know that Kentucky
19 provided it.

20 Q. And did you ever get any of those
21 numbers?

22 A. No, I did not.

23 Q. Okay. Does TDOC know which states
24 currently have a supply of pentobarbital?

25 A. TDOC would assume that Georgia has a

1 supply and Texas has a supply. But again,
2 that's an assumption.

3 Q. What about is TDOC aware of whether
4 Missouri has a supply of pentobarbital?

5 A. Not specifically, no.

6 Q. Is TDOC aware of whether South Dakota
7 currently has a supply of pentobarbital?

8 A. Not specifically, no.

9 Q. And how about the federal government?

10 A. TDOC is aware that the federal government
11 had a supply of pentobarbital and may still
12 have a supply of pentobarbital. But the
13 federal government is also unwilling to provide
14 any information or source to provide
15 pentobarbital to Tennessee.

16 Q. Why do you think all these other
17 states -- Texas, Missouri, South Dakota,
18 Georgia, and the federal government -- can
19 obtain pentobarbital but Tennessee can't obtain
20 pentobarbital?

21 MR. MITCHELL: Objection to the form
22 and beyond the scope of the notice.

23 You can answer.

24 THE WITNESS: It could be for
25 different reasons, I guess. I -- it could be

1 because of individual agreements that
2 someone -- that a state may have had long-term
3 agreements working with a pharmacy that
4 provides that pento.

5 And, you know, I don't know. If I
6 knew that, I would try to do anything I could
7 to alleviate those issues. But I don't know
8 the specifics to answer that question.

9 BY MR. KURSMAN:

10 Q. Okay. Has TDOC reached out to any state
11 since the PowerPoint presentation, since August
12 31st, 2017?

13 A. Yes.

14 Q. When was the last time that TDOC had
15 reached out to a state in search of
16 pentobarbital?

17 A. Those conversations have happened through
18 the commissioner, again, as recently as August
19 of this year, as well as in an ongoing effort
20 to try to find pentobarbital.

21 Q. And what were you told in August of this
22 year?

23 A. Basically the same that I've been told
24 all along. That it's not available. That you
25 can't find a source for it. Either in the --

1 or that no one had a viable source for it in
2 Tennessee, for either the compounded form of
3 pentobarbital or commercially manufactured
4 pentobarbital.

5 Q. Let's go to page 9 of the PowerPoint. Do
6 you see it says, compounding -- in the third
7 bullet, the compounding pharmacy agreed to both
8 compound the LIC and aid in the search for a
9 source?

10 A. Several pharmacies declined to be
11 involved in any way? Is that the one you're --

12 Q. Yes.

13 A. Yes.

14 Q. Is that the same compounding pharmacy
15 that you're working with now?

16 A. It's my understanding, yes.

17 Q. Okay. How -- how are they aiding in the
18 search for a source of pentobarbital?

19 A. They are working with the drug procurer
20 for the state to attempt to find pentobarbital.

21 Q. Does TDOC know exactly what the pharmacy
22 is doing to attempt to obtain pentobarbital?

23 A. Other than the request being made for an
24 ongoing search of pentobarbital and their --
25 their attempts to find pentobarbital.

1 Q. Does TDOC know what the pharmacy has been
2 doing in an attempt to obtain midazolam?

3 A. Again, it's the State's understanding
4 that the pharmacy would be working to ensure
5 that a source was maintained to provide
6 midazolam to the state of Tennessee for
7 executions.

8 Q. Does TDOC know whether those two
9 searches, the search for midazolam and the
10 search for pentobarbital, does TDOC know
11 whether those two searches are different?

12 MR. MITCHELL: I'm going to object to
13 the form.

14 THE WITNESS: TDOC would assume they
15 are different and -- could be different because
16 we're talking about different drugs. But
17 again -- and also the availability of the one
18 drug as compared to the other. The history of
19 the availability of midazolam versus
20 pentobarbital, as well as the request for
21 pentobarbital from states as compared to
22 midazolam, all those would be differences.

23 We also understand that, you know,
24 the pharmacy would -- we would assume that the
25 pharmacy would reach out to different sources

1 for the ingredients for a particular drug.

2 So in those ways it would be
3 different.

4 BY MR. KURSMAN:

5 Q. So does TDOC want the search for
6 pentobarbital to be as exhaustive as the search
7 for midazolam?

8 MR. MITCHELL: Object to the form.
9 And also beyond the scope of the notice.

10 You can answer.

11 THE WITNESS: TDOC wants the search
12 for midazolam and pentobarbital. But again, in
13 our current protocol is use of midazolam. Our
14 priority is -- if there is a priority, I think
15 the priority would be both. But the current
16 protocol calls for midazolam. So we certainly
17 want to be sure that we maintain a supply of
18 midazolam.

19 BY MR. KURSMAN:

20 Q. So just so I'm clear, you would want the
21 search for pentobarbital to be as exhaustive as
22 the search for midazolam?

23 MR. MITCHELL: Same objections.

24 THE WITNESS: Yeah. Our request is
25 for both and to find a source for both.

1 BY MR. KURSMAN:

2 Q. And would you want the pharmacist
3 searching for the API of pentobarbital?

4 A. Yes.

5 MR. MITCHELL: Same objections.

6 BY MR. KURSMAN:

7 Q. Okay. And does TDOC believe that the
8 pharmacist is currently searching for the API
9 of pentobarbital?

10 A. Yes.

11 Q. Okay. Do you know how the compounding
12 pharmacy searches for potassium chloride?

13 A. The specifics, no. Other than -- the
14 assumption would be made by the Department that
15 they would -- for potassium chloride, this
16 pharmacy would be looking for manufactured
17 supply or the ingredients for a compounding
18 solution of potassium chloride.

19 Q. And is that also true for vecuronium
20 bromide?

21 A. Again, if there was not a manufactured
22 supply of vecuronium, then the -- the search
23 for the ingredients to compound vecuronium
24 would be reasonably assumed.

25 Q. Okay. Let's go to page 10.

1 A. 10, you said? I'm sorry.

2 Q. 10, yes.

3 A. Okay.

4 Q. Do you say -- do you see it says,
5 collectively, contact was made with close to
6 100 potential sources?

7 A. I see that.

8 Q. Have sources been contacted since this
9 protocol -- since this PowerPoint? I
10 apologize.

11 A. Yes.

12 Q. Other sources aside from the current
13 compounding pharmacy that you're working with?

14 A. I would make the assumption that it's --
15 that's the case. But again, the drug procurer
16 for the Department would be working directly
17 with the current pharmacy, as well as any other
18 source that we could find in search of the
19 pentobarbital.

20 Q. Did TDOC attempt to contact any sources
21 outside of the United States?

22 A. I do not know.

23 Q. Okay. Now, let's go to the second bullet
24 point. Do you see it says, company did not
25 have sufficient quantities of the needed form

1 of pentobarbital.

2 Do you see that?

3 A. I see that, yes.

4 Q. What does sufficient quantities mean to
5 TDOC?

6 A. Sufficient quantities to provide
7 pentobarbital to the Department to carry out an
8 execution.

9 Q. Right. But my question, though, is, what
10 is that number? Before we saw in an e-mail
11 that they asked for 100 grams of pentobarbital.
12 Is that the sufficient quantity that this
13 bullet point is talking about?

14 MR. MITCHELL: I'm going to object
15 that this is beyond the scope of the notice.

16 But you can answer.

17 THE WITNESS: No. It's my
18 understanding -- State's understanding that the
19 quantity was not sufficient to carry out a
20 single execution using pentobarbital.

21 BY MR. KURSMAN:

22 Q. Okay. So it's TDOC's understanding that
23 at the time this PowerPoint was made, TDOC
24 could not obtain even 500 milligrams of -- 5
25 grams of pentobarbital?

1 A. So, yeah, the Department -- it's our
2 understanding that we could not acquire
3 pentobarbital in a sufficient amount to carry
4 out an execution using pentobarbital as
5 described in our protocol.

6 Q. Okay. Let's go to page 11. Do you see
7 that first paragraph? It says, the search was
8 brought into a possibility of importing the
9 chemicals from overseas?

10 A. Yes.

11 Q. What did TDOC do to attempt to obtain
12 pentobarbital from overseas?

13 MR. MITCHELL: I'm going to object to
14 the form.

15 THE WITNESS: I think this may have
16 been in reference to what the Department of
17 Corrections found in their search for
18 pentobarbital; that it was common that the
19 search for the pentobarbital has been expanded
20 to broaden into the possibility of importing
21 chemicals from overseas. It probably was in
22 reference to another state that attempted this
23 process.

24 BY MR. KURSMAN:

25 Q. So -- just so I'm clear. So TDOC did not

1 attempt to obtain pentobarbital from overseas;
2 is that right?

3 A. Not that I -- not that I know. Not that
4 I'm aware of, no.

5 Q. Okay.

6 A. I think TDOC, again, using the
7 information that we had, the contacts that we
8 had, the resources that we had, and the
9 information related to obtaining pentobarbital,
10 it was obvious that sourcing pentobarbital from
11 out of the country, that there was a
12 significant obstacle there that prevented that
13 from the federal government.

14 Q. Since this PowerPoint was created, has
15 TDOC attempted to obtain pentobarbital from
16 overseas?

17 A. Not that I'm aware of. It's possible
18 that it -- the pharmacy could have investigated
19 that opportunity. But I don't have personal
20 knowledge of that, so. But again, the request
21 from the drug procurer to the pharmacy is that
22 we continue to look for pentobarbital in any
23 form.

24 Q. Okay. But the drug procurer or any
25 employee of TDOC, none of them attempted to

1 obtain pentobarbital from overseas directly?

2 A. Not that I'm aware of.

3 Q. Okay. Let's go to page 13. Do you see
4 the second paragraph? It says -- redacted --
5 is now researching FDA regulations. As a
6 result, this case determined what, if any,
7 process can be undertaken to obtain FDA
8 approval for the implementation of
9 pentobarbital. Thus far the approval process
10 appears to be very cumbersome, unless an
11 exception can be claimed to lessen the burden.

12 Do you see that?

13 A. I do.

14 Q. What were the results of that research?

15 A. To the best of my knowledge that -- the
16 research was that the regulations that
17 prohibited the importation of pentobarbital for
18 the use of lethal injections were not removed
19 and that there was no relief found there in any
20 way or any form.

21 Q. And when did you have a conversation with
22 the person that was doing this research? What
23 year would that have been?

24 A. It --

25 MR. MITCHELL: I'm going to object to

1 the form.

2 You can answer.

3 THE WITNESS: Okay. It would have
4 been during the time before this PowerPoint was
5 developed. I don't remember the exact date.

6 BY MR. KURSMAN:

7 Q. Do you remember who was involved in the
8 conversation, without identifying any --

9 A. The drug procurer. The drug procurer,
10 myself, the state that was involved in this
11 process, and possibly the pharmacist.

12 Q. What do you mean by the state that was
13 involved in this process?

14 MR. MITCHELL: I'm going to object
15 pursuant to the protective order, if that is --
16 if it's asking for the actual state.

17 MR. KURSMAN: No, I'm not asking for
18 the actual state. I apologize if it seemed
19 like I was asking for the state.

20 THE WITNESS: So officials --
21 officials who -- who work for the state where
22 this incident occurred, where drugs were
23 imported -- pentobarbital and drugs were
24 attempted to be imported that the federal
25 government confiscated.

1 BY MR. KURSMAN:

2 Q. And what were you told at that meeting?

3 A. Basically that the FD -- that the federal
4 government confiscated the drugs because of a
5 law that said if -- you could not import drugs
6 if there was a supply of drugs within the
7 country. They would not allow it.

8 Q. Does TDOC know what was cumbersome, as
9 used here, about the approval process?

10 A. Oh, I think that was just a reference to
11 the regulations and the lack of response in
12 many cases that the federal government supplied
13 to states.

14 Q. Did TDOC attempt to obtain an exception?

15 A. I think TDO -- I'm not sure. I would
16 have to -- I would have to follow up on that.
17 I'm not sure to answer that.

18 Q. When was the --

19 A. I know --

20 Q. Go ahead.

21 A. I know that we -- again, we explored the
22 options. Had conversations with the state that
23 was involved here. And it is possible that the
24 drug procurer may have had conversations with
25 federal authorities in regard to that. But

1 again, I would want to verify that.

2 Q. Do you know when the last time those
3 conversations would have taken place, if they
4 did take place?

5 A. I do not.

6 Q. Would it -- would it have been after this
7 PowerPoint or before?

8 A. It would have been before and possibly
9 afterwards also.

10 Q. Okay. How much after? And would it have
11 been in the last three years?

12 A. I think -- I think very possibly. If
13 there was a change in this subject matter,
14 regulation, and an indication that the federal
15 authorities were willing to back off of their
16 restrictive stats, that it's very possible that
17 that would have happened recently.

18 Q. Would TDOC have instructed the drug
19 procurer or someone at TDOC to contact the
20 federal government if a change was made?

21 A. Well, TDOC's instructions to the drug
22 procurer has always been to continue the effort
23 to find pentobarbital in any form, in any
24 fashion. And if that would include this, yes,
25 it would.

1 Q. And if the drug procurer didn't contact
2 the federal government or attempt to claim an
3 exception, would it be TDOC's position that the
4 drug procurer wasn't appropriately doing their
5 job?

6 MR. MITCHELL: Object to the form and
7 beyond the scope of the notice.

8 You can answer.

9 THE WITNESS: No, it would not.

10 BY MR. KURSMAN:

11 Q. Why?

12 A. Well, because the drug procurer is making
13 the attempts, as requested, to find
14 pentobarbital. That includes many avenues.
15 And without speaking to drug procurer, I don't
16 know exactly if he did or if he did not make
17 this attempt.

18 Q. Let's go to page 16 -- I mean, I
19 apologize. To -- yeah, page 16 of the
20 protocol. I mean, of the PowerPoint.

21 Do you see at the beginning it says,
22 a few years ago approximately 13 states reached
23 out to the Department of Justice seeking aid
24 for a source of LIC chemicals?

25 A. I do.

1 Q. Was TDOC one of those 13 states?

2 A. I'm not sure.

3 Q. Okay. And I think we went over this a
4 minute ago, but did TDOC at any point reach out
5 to the Department of Justice?

6 A. Again, it's possible. But I'm not sure
7 that they did.

8 Q. And what -- in the second paragraph in
9 this page, can you describe for me what that
10 means?

11 MR. MITCHELL: I'm sorry, what's the
12 question? Just -- is it, the question, what
13 the second paragraph on page 16 means?

14 MR. KURSMAN: Yep.

15 MR. MITCHELL: Okay. I'm going to
16 object that that's beyond the scope of the
17 notice.

18 But you can answer.

19 And I'm going to object to the form.

20 THE WITNESS: I would be speculating,
21 but it's my assumption here that we were
22 referencing a -- the federal government's
23 authority to, again, step in and assist in the
24 supply of drugs. Just as it says, where the
25 supply is low and the cost for the chemical is

1 so high to make it virtually unavailable.

2 BY MR. KURSMAN:

3 Q. Did anyone from TDOC ask the federal
4 government to do this?

5 A. Not that I'm aware of.

6 Q. So can we go to the next page, page 17?

7 A. Yeah.

8 Q. And there's a big question mark that
9 likes look it's asking the people watching the
10 PowerPoint to ask questions?

11 A. Yes.

12 Q. Did anyone ask questions or make
13 statements after the PowerPoint?

14 A. There could have been questions made,
15 minor questions. I don't recall specifically
16 the questions -- the specific questions. But
17 it is possible, yes.

18 Q. But you don't recall who asked questions?

19 A. I do not.

20 Q. Okay. So after this PowerPoint was made
21 and presented, how long after did TDOC begin to
22 look for midazolam?

23 A. I would say within a few weeks the
24 process began.

25 Q. And did you look for midazolam before

1 this PowerPoint was made?

2 A. Again, I think that we were under -- we
3 were very aware that pentobarbital was not
4 going to be available, and we continued to be
5 unable to find a source of pentobarbital. And
6 the inquiries and the consideration of using
7 another alternative method was upon us.

8 So to say that we did not consider or
9 begin the process before might not be totally
10 accurate. But the concerted effort to find the
11 midazolam and all began shortly after this or
12 about the same time.

13 Q. Was the pharmacy owner's e-mail that
14 expressed concerns about midazolam, was that
15 presented to the same individuals who were
16 present for this PowerPoint?

17 A. Not that I recall. I don't -- I don't
18 think so, no.

19 Q. Okay.

20 A. There -- there could have been -- let me
21 give you an example. If there were
22 representatives of the Attorney General's
23 office at the meeting, they could have -- that
24 would have had knowledge of this -- of the --
25 of the pharmacy's concerns, there could have

1 been knowledge that way. But not the Governor
2 or others.

3 Q. And does -- is it TDOC's position that
4 the pharmacist is wrong?

5 MR. MITCHELL: Object to the form.

6 THE WITNESS: TDO's position is that
7 midazolam is sufficiently serving its purpose
8 in the three-drug protocol, as we currently use
9 in Tennessee to render the inmate unconscious
10 in the process of lethal injection.

11 BY MR. KURSMAN:

12 Q. But does TDOC believe that the pharmacist
13 is incorrect when the pharmacist says the
14 inmate may experience the pain of the second
15 and third drugs?

16 MR. MITCHELL: Again, object to the
17 form.

18 THE WITNESS: TDOC believes that the
19 use of midazolam makes the inmate unconscious.
20 And -- and that the two -- that midazolam is
21 appropriate for the purpose, as we use it in
22 our protocol.

23 I -- there's different opinions. We
24 realize there's some people who says that
25 midazolam does not make people insensate and

1 unconscious. And there's people that says that
2 inmates will not feel pain by the use of
3 midazolam in the quantities that we give.

4 So it's our position that we feel
5 like that it's adequate and serves the purpose,
6 as it's prescribed in our protocol.

7 BY MR. KURSMAN:

8 Q. How did TDOC decide which group's
9 opinions to go with?

10 A. TDOC used the information that we had
11 available, again, through the review of what
12 was being used in other states, what was
13 readily available to us, as well as the team as
14 I described before who worked on the protocol
15 and their communications with individuals, as
16 well as the direct communications that the
17 commissioner had with other states who use
18 midazolam in their protocols.

19 Q. Did TDOC consult with any pharmacist who
20 advised that based on this protocol, the
21 prisoner would not experience pain from the
22 second or third drugs?

23 A. I'm not aware of a pharmacist, no.

24 Q. How about a pharmacologist?

25 A. Not that I'm aware of.

1 Q. Okay. Let's go to Exhibit 18. And do
2 you see this is from June 20th, 2018?

3 A. Yes.

4 Q. Do you see it's -- TDOC is searching for
5 USP-grade pentobarbital. We need at least 10
6 grams. Do you see that?

7 A. I do.

8 Q. Why are they asking for 10 grams?

9 A. It's my understanding they would be
10 looking at the number of inmates who were --
11 could have been potentially coming up for
12 execution dates and trying to find
13 pentobarbital to carry out those executions for
14 the State.

15 Q. But why ask for a threshold amount at 10
16 grams rather than 5 grams?

17 A. Well, again, they would want -- the
18 assumption would be that they would be asking,
19 is there a supply -- should they have that many
20 people at one time get an execution date and be
21 available to provide pentobarbital to carry out
22 those executions.

23 But don't -- it's very -- I want to
24 be clear that our search was for any amount of
25 pentobarbital. And I realize it says at least

1 10 grams. But I -- there again, we're looking
2 at one piece of a conversation here. And we
3 don't know the -- or I don't know the other
4 conversations that took place before or
5 afterwards.

6 Q. Right. But we can actually see the other
7 conversations. And the other conversations
8 say, in the previous e-mails I mentioned,
9 needing 100 grams.

10 So there's now been two requests.
11 One for 100 grams of pentobarbital and one for
12 10 grams of pentobarbital. Does TDOC know why
13 its employee was requesting more pentobarbital
14 than needed for one execution?

15 A. Again, I think they were looking for a
16 supply that was sufficient to provide the
17 chemicals for a group of inmates who may have
18 been -- may have a date set at one particular
19 time. And I think it's also relevant that we
20 didn't know how far those dates would be, at
21 what point they would be, would we have
22 multiple executions on one day.

23 So there's a lot of things that were
24 probably -- that were going on here. But
25 again, the -- my answer would be that they were

1 considering the number of people who were up
2 for execution or potentially could be up for
3 the -- with a date of execution, and they were
4 making an attempt to find the quantity
5 necessary to carry out those executions.

6 Q. But if this pharmacy responded no, all
7 TDOC would know is that they either didn't have
8 100 grams initially or 10 grams now, correct?

9 A. If you only --

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: If you only considered
12 what's written here, without considering phone
13 call conversations or other conversations
14 between these individuals that I may not have
15 knowledge of.

16 BY MR. KURSMAN:

17 Q. And are you aware of the phone calls that
18 may have went on?

19 A. I'm aware of our instructions, as a
20 state, to -- through the drug procurer and the
21 pharmacist that we would -- we were -- we were
22 searching for any amount of pentobarbital.

23 Q. And that's also in the API form as well?

24 A. In both forms. Any form.

25 Q. Okay. Let's go to Exhibit 19. And do

1 you see this is a -- it says at the top, slip
2 opinion, whether the Food and Drug
3 Administration has jurisdiction over articles
4 intended for use in lawful executions?

5 A. Yes.

6 Q. Do you see it's dated May 3rd, 2019?

7 A. Yes.

8 Q. And do you see it says, memorandum
9 opinion for the Attorney General?

10 A. Yes.

11 Q. And do you understand that's the Attorney
12 General of the United States?

13 A. Yes.

14 Q. Have you ever seen this memorandum
15 before?

16 A. I have not.

17 Q. Okay. Do you know if TDOC is aware of
18 this memorandum?

19 A. I am not aware.

20 Q. Is TDOC aware that this memorandum
21 instructs the FDA to not exercise jurisdiction
22 over the importation of lethal injection drugs?

23 MR. MITCHELL: Object to the form and
24 the scope of the notice.

25 You can answer.

1 THE WITNESS: I am not.

2 BY MR. KURSMAN:

3 Q. When you say you are not, do you mean
4 TDOC is not aware?

5 A. That's correct.

6 MR. MITCHELL: Same objections.

7 THE WITNESS: Oh, well, yeah, as
8 commissioner I am not aware. It's possible
9 that the chief legal counselor may be aware,
10 but I'm not aware.

11 BY MR. KURSMAN:

12 Q. But as a representative for TDOC in this
13 deposition or --

14 A. I would say we may be aware --

15 MR. MITCHELL: Alex, what topic is
16 this? What topic of examination does this
17 pertain to?

18 MR. KURSMAN: Okay. So 27, 28, 29.
19 22.

20 BY MR. KURSMAN:

21 Q. After this --

22 MR. MITCHELL: Was 22 -- wasn't 22
23 stricken per our phone call? Because that's
24 electrocution.

25 MR. KURSMAN: Oh, I apologize.

1 MR. MITCHELL: Okay.

2 BY MR. KURSMAN:

3 Q. Has anyone ever discussed this memo at
4 TDOC with you personally?

5 MR. MITCHELL: And again, I'll object
6 that this is beyond the scope of the notice.

7 But you can answer.

8 THE WITNESS: Not that I recall.

9 BY MR. KURSMAN:

10 Q. And are you aware personally that this
11 memo instructs the FDA to not exercise
12 jurisdiction over the importation of lethal
13 injection drugs?

14 A. No.

15 Q. Okay. Do you know if anyone at TDOC
16 discussed this memo with its source that had a
17 visit from the DEA?

18 MR. MITCHELL: Object to the form.

19 THE WITNESS: I am not aware.

20 BY MR. KURSMAN:

21 Q. Do you know if anyone at TDOC attempted
22 to obtain pentobarbital from overseas after
23 this May 3rd, 2019, memo came out?

24 A. I am not aware. I'm not sure.

25 Q. Did you discuss with your source

1 importing pentobarbital from overseas after
2 this memo was published?

3 A. Not that I'm aware of.

4 Q. And did you discuss this memorandum with
5 the United States Department of Justice?

6 A. Not that I'm aware of.

7 Q. Okay. Let's go to Exhibit 20. Do you
8 see this is an e-mail, December 4th, 2017?

9 A. I do.

10 Q. And it says vecuronium is the only one
11 that requires reconstitution?

12 A. I see that, yes.

13 Q. What does reconstitution mean?

14 A. Reconstitution is the mixing of a drug
15 that's in powder form with the bacteriostatic
16 water that -- basically the vecuronium bromide
17 in this case.

18 Q. And who at TDOC reconstitutes the
19 vecuronium bromide?

20 A. The executioner.

21 Q. How is the executioner qualified to
22 reconstitute vecuronium bromide?

23 MR. MITCHELL: Object to the form.

24 You can answer.

25 THE WITNESS: Per the instructions of

1 the pharmacist that provides the vecuronium
2 bromide.

3 BY MR. KURSMAN:

4 Q. And does TDOC have instructions for
5 reconstituting the vecuronium bromide?

6 A. Yes. That -- those instructions were
7 provided to the executioner by -- by the
8 pharmacist.

9 MR. KURSMAN: Okay. And we would
10 request a copy of those instructions.

11 BY MR. KURSMAN:

12 Q. Is TDOC aware that reconstitution
13 requires scientific skill?

14 A. TDOC is aware that reconstitution
15 requires a process that has been approved
16 through the appropriate individuals and means
17 and regulations of pharmaceutical standards and
18 protocols.

19 Q. But is TDOC aware that reconstitution
20 requires scientific skill of the individual
21 doing the reconstitution?

22 MR. MITCHELL: Object to the form.

23 THE WITNESS: No.

24 BY MR. KURSMAN:

25 Q. Is TDOC aware that reconstitution

1 requires technical skill --

2 MR. MITCHELL: Same objection.

3 BY MR. KURSMAN:

4 Q. -- of the individual doing the
5 reconstitution?

6 A. I would say, yes.

7 Q. Now, let's look at Exhibit 24.

8 A. 20 -- what? I'm sorry.

9 Q. 24. I apologize.

10 Do you see this says, subject -- if
11 you go down to the bottom, August 8, 2019, at
12 7:55 a.m. It says, subject KCL protocol?

13 A. Yes.

14 Q. And it says, I made edits to the
15 instructions. Could you have pharmacist review
16 it and confirm these are good?

17 Do you see that?

18 A. Yes.

19 Q. Did an employee -- is this -- is this
20 e-mail from an employee at TDOC?

21 A. I would assume that it is --

22 Q. Okay.

23 A. -- based on what's written there.

24 Q. What experience or expertise does this
25 employee at TDOC have to make edits to

1 pharmacological instructions?

2 MR. MITCHELL: Object to the form.

3 THE WITNESS: This person would have
4 been making edits with instruction from the
5 pharmacist regarding this process. Them
6 personally, I know of no qualifications, other
7 than their role in this process and their
8 direct communication with the pharmacist at the
9 time.

10 BY MR. KURSMAN:

11 Q. So why would an employee of TDOC be
12 making edits to the instructions that the
13 pharmacist provided?

14 MR. MITCHELL: Same objection.

15 THE WITNESS: Again, without --
16 without knowing the particular edits that we're
17 talking about, it would be hard to say. Again,
18 I would read this as a conversation related to
19 the process of removing the compounded chemical
20 from a frozen state and placing it in the
21 refrigerator for 24 hours to thaw and verifying
22 that it was written in a process that would
23 be -- would meet the requirements of the drug,
24 as per the pharmacist who they were
25 communicating with.

1 BY MR. KURSMAN:

2 Q. Do you know who -- which individual from
3 TDOC wrote this e-mail?

4 A. I would assume this is the drug procurer.

5 Q. Okay. And was it in consultation with
6 anyone else at TDOC?

7 A. Not that I'm aware of.

8 Q. Okay. Let's go to Exhibit 35. That
9 would be the first exhibit in the next binder.

10 A. Okay.

11 Q. Okay. Do you see at the top it says
12 proposed alternative?

13 A. I'm sorry. You said 35?

14 Q. Yeah, Exhibit 35. Do you see at the
15 top --

16 A. Proposed alternative. Yes, I'm sorry.
17 I'm sorry.

18 Q. And it says, midazolam, digoxin, morphine
19 sulfate, and propranolol?

20 A. Yes, I see that.

21 Q. Okay. Was TDOC aware at this time that
22 an individual was offering a proposed
23 alternative to the three-drug method?

24 A. I would assume based on what I'm seeing
25 here that that's a possibility that someone was

1 offering a second method or an alternative.

2 Q. Have you seen this e-mail before?

3 A. I have not.

4 Q. Okay. Did TDOC look for the proposed
5 alternatives listed?

6 A. Not that I'm aware of.

7 Q. Why not?

8 A. For reasons that I've already stated,
9 that we were -- we were satisfied that the
10 three-drug program that we were using --
11 midazolam, vecuronium, and potassium chloride
12 -- was the best protocol that we could find.

13 Q. Do you have any reason to believe that
14 you couldn't obtain digoxin for use in
15 executions?

16 A. I have no reason to believe that we
17 couldn't, no.

18 Q. Do you have any reason to believe that
19 you couldn't obtain morphine sulfate for use in
20 executions?

21 A. Again, same answer. Possibly we could
22 have, yes.

23 Q. Do you have any reason you couldn't
24 obtain propranolol for use in executions?

25 A. Again, making the assumption that what's

1 here possibly could have been available, I have
2 no reason to say that. I believe that we would
3 not have been able to obtain it.

4 Q. You believe -- I apologize. So you're
5 saying you have no reason to believe that you
6 couldn't obtain pentobarbital -- propranolol
7 for use in execution?

8 A. Again, I --

9 MR. MITCHELL: Can you -- I'm sorry.
10 I'm not even following what you're asking. Can
11 you just rephrase the question?

12 MR. KURSMAN: Sure.

13 MR. MITCHELL: Thank you.

14 BY MR. KURSMAN:

15 Q. Do you have -- do you have any reason to
16 believe that you couldn't obtain propranolol
17 for use in executions?

18 MR. MITCHELL: Object to the form.
19 Beyond the scope of the notice.

20 You can answer.

21 THE WITNESS: The drugs that we could
22 obtain, from my knowledge and the State's
23 knowledge, were midazolam, vecuronium, and
24 potassium chloride. I have no reason to
25 believe that these other drugs would have been

1 readily available for us to use.

2 But again, I don't know the
3 conversation particularly here that took place.

4 BY MR. KURSMAN:

5 Q. But do you have any reason to believe
6 that you wouldn't be able to obtain them?

7 MR. MITCHELL: Same objections.

8 THE WITNESS: Other than based on the
9 -- based on the fact that the issues we were
10 having with obtaining pentobarbital, the issues
11 that other states were having in some cases in
12 obtaining midazolam and vecuronium, it was a
13 reasonable assumption that these other drugs,
14 although mentioned, may have been impossible to
15 obtain. I know of no effort that we made to
16 obtain those particular drugs.

17 BY MR. KURSMAN:

18 Q. Do you have -- do you have any reason to
19 believe you couldn't obtain diazepam for use in
20 executions?

21 MR. MITCHELL: Object to the form and
22 the scope of the notice.

23 You can answer.

24 THE WITNESS: It would -- again, I
25 would say the same answer again. Obtaining the

1 drug to use in a -- in lethal injection we
2 found was very difficult. And we were able to
3 find the midazolam and vecuronium and potassium
4 chloride. I would have no anticipation of
5 being able to readily find any of these other
6 drugs.

7 BY MR. KURSMAN:

8 Q. You testified earlier that TDOC only
9 looked for four drugs total, right?
10 Pentobarbital and three drugs in the lethal
11 injection protocol, correct?

12 A. Correct.

13 Q. And now I'm asking you if you had any
14 reason to believe you couldn't obtain these
15 other drugs, these drugs that you have
16 testified earlier that you had never looked
17 for, correct?

18 MR. MITCHELL: Object to the form.

19 Sorry.

20 BY MR. KURSMAN:

21 Q. Are you testifying now that you do have
22 reason to believe you couldn't obtain these
23 other drugs that I'm asking you about, even
24 though you didn't search for them?

25 MR. MITCHELL: Object to the form.

1 And beyond the scope of the notice.

2 THE WITNESS: Again, I would -- I
3 would just say that it would seem reasonable to
4 me that it would be -- would probably have been
5 difficult to obtain. But again, since we
6 didn't particularly look for these drugs, it
7 would be just speculation on my part.

8 BY MR. KURSMAN:

9 Q. Did you have any reason to believe you
10 couldn't obtain amitriptyline for use in
11 executions?

12 MR. MITCHELL: Same objections.

13 THE WITNESS: Same answer.

14 BY MR. KURSMAN:

15 Q. Do you have any reason to believe you
16 couldn't obtain phenobarbital in these
17 executions?

18 MR. MITCHELL: Same objection.

19 THE WITNESS: Again, same answer.

20 BY MR. KURSMAN:

21 Q. Do you have any reason to believe you
22 couldn't obtain secobarbital for use in
23 executions?

24 MR. MITCHELL: Object to the form.

25 THE WITNESS: Yeah. Again, my

1 thoughts would be that, again, finding
2 midazolam, vecuronium, and potassium chloride,
3 considering the problems that other states were
4 having in obtaining chemicals to be used in
5 lethal injections protocols in other states, it
6 was difficult for -- to find a supply for these
7 drugs to be used in the correctional setting.
8 So my reasonable assumption would be any of
9 these drugs could have been very difficult to
10 find.

11 BY MR. KURSMAN:

12 Q. But you've never attempted to obtain any
13 of these drugs, right?

14 A. Correct. Not to my knowledge.

15 Q. And when you initially contacted the
16 current pharmacist about whether they could
17 supply you with midazolam, am I right that that
18 same day they said yes?

19 A. Yes.

20 Q. And you're describing that as difficult
21 to obtain, midazolam?

22 A. I am.

23 Q. Okay.

24 MR. MITCHELL: Can we go off record
25 real quick?

1 MR. KURSMAN: Sure.

2 THE VIDEOGRAPHER: One moment,
3 please. Going off the record at 1:56 p.m.

4 (Short break.)

5 THE VIDEOGRAPHER: Back on the record
6 at 2:08 p.m.

7 BY MR. KURSMAN:

8 Q. Commissioner Parker, before we went to
9 break we were discussing secobarbital. Is TDOC
10 aware that an oral administration of
11 secobarbital could be used as an alternative
12 method of execution?

13 MR. MITCHELL: Going to object to the
14 form.

15 You can answer.

16 THE WITNESS: No.

17 BY MR. KURSMAN:

18 Q. In preparation for your testimony today,
19 did you review the complaint in this case?

20 A. I did.

21 Q. Did you review the proffered alternatives
22 in this case?

23 A. I did.

24 Q. Are you aware that some states perform
25 executions by firing squad?

1 A. I am.

2 Q. Okay. And are you aware one of those
3 states would be Utah?

4 A. Correct.

5 Q. Do you know if TDOC employees are
6 required to complete firearms training as a
7 requirement to be an employee of TDOC?

8 A. Yes.

9 Q. Do you know of anyone at TDOC that's
10 qualified to use a firearm?

11 A. Yes.

12 Q. Does TDOC provide firearms training?

13 A. Yes, we do.

14 Q. Does TDOC have access to a firearms range
15 or a shooting range?

16 A. Yes, we do.

17 Q. And does TDOC own firearms?

18 A. We do.

19 Q. And can you readily acquire firearms?

20 A. Yes. We can acquire the firearms, yes.

21 Q. And does TDOC own ammunition?

22 A. We do.

23 Q. Can you readily acquire ammunition?

24 A. Yes.

25 Q. Does TDOC have facilities where a firing

1 squad execution could take place?

2 MR. MITCHELL: Object to the form.

3 You can answer.

4 THE WITNESS: Not that I'm aware of.

5 BY MR. KURSMAN:

6 Q. Is TDOC aware of how Utah performs its
7 executions by firing squad?

8 A. Not the specifics, no.

9 Q. Has TDOC ever looked into Utah's
10 execution by firing squad protocol?

11 A. No.

12 Q. Okay. Do you believe -- well, could TDOC
13 execute someone by firing squad?

14 MR. MITCHELL: Object to the form.

15 THE WITNESS: TDOC would not be able
16 to execute someone by method of firing squad.
17 First of all, TDOC is not familiar with the
18 process. There's -- I'm not sure -- TDOC would
19 not be sure of the physical plant requirements
20 for such an event, as well as the fact that
21 Tennessee State Legislature does not recognize
22 firing squad as a legal means of execution in
23 this state. And the fact that there are many
24 considerations that would have to be reviewed,
25 would have to -- processes considered related

1 to the use of a firing squad in the state.

2 BY MR. KURSMAN:

3 Q. Could TDOC start by reviewing Utah's
4 execution protocol?

5 A. I think Tennessee could -- I mean, it's
6 possible we could review their protocol,
7 obviously. But again, I would go back to the
8 methods of approved execution in the state of
9 Tennessee, which are lethal injection and for
10 those inmates convicted prior to January 1 of
11 '99, electrocution.

12 But again, using a method such as a
13 firing squad, I mean, the Department would --
14 as we sit here today, I would have -- I don't
15 know where I would start in regard to -- other
16 than reviewing some other state's protocol to
17 try to determine what would be necessary. A
18 lot of considerations. Ricochet, how you
19 prevent ricochet. How do you ensure
20 confidentiality. How do you protect the
21 environment that you're using. Issues of
22 securing the offender, the weapon, the type of
23 weapon, the type of ammunition. I mean,
24 there's a lot of things that would have to go
25 -- be considered there.

1 Q. But you could start by looking at Utah's
2 protocol?

3 A. Again, reviewing another state's protocol
4 would be possible, yes.

5 Q. And after you reviewed Utah's protocol --
6 which you said TDOC has not done, right?

7 A. Correct.

8 Q. Okay. So you -- so TDOC has not looked
9 into whether they could perform an execution by
10 firing squad?

11 MR. MITCHELL: Object to the form.

12 THE WITNESS: TDOC has considered
13 that based on the complaint, the fact -- and
14 just the initial -- the initial conclusion is,
15 again, first of all, the state legislature does
16 not recognize a legal means of execution in
17 Tennessee by the use of a firing squad. But
18 then also the other elements that go into
19 developing a protocol have not been addressed.

20 BY MR. KURSMAN:

21 Q. Sure. Sure. I understand that. But
22 when you created this current protocol, you
23 said you started by looking at other protocols
24 of different states?

25 A. Correct.

1 Q. Couldn't you do the same for a firing
2 squad protocol?

3 A. You could do the same, as far as looking
4 at their -- looking at the protocol for another
5 state, obviously. But the difference would be
6 that in Tennessee, Tennessee recognizes lethal
7 injection as a legal means of execution.
8 Currently that's not the case in Tennessee for
9 a firing squad.

10 Q. Yeah. I'm only asking whether it's
11 physically possible for Tennessee adopt
12 execution by firing squad, not whether it's
13 possible.

14 A. I understand. And then the -- is it
15 physically possible? Again, the State of
16 Tennessee -- there's a lot of elements in the
17 process that would have to be explored, again,
18 that the State is currently not aware of, such
19 as physical plant requirements, how you control
20 for confidentiality, how you control for safety
21 and security of the facility or wherever this
22 process took place. Several elements that we
23 would not have knowledge of at this point.

24 Q. Are you aware that Utah is controlling
25 for all these things and all of your concerns

1 in their executions by firing squad?

2 MR. MITCHELL: Object to the form.

3 THE WITNESS: It would be an
4 assumption that I would make that they are.
5 But again, without having personal knowledge of
6 that, it would just only be an assumption.

7 BY MR. KURSMAN:

8 Q. Okay. Could TDOC execute someone by a
9 single bullet to the back of the head?

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: I would have, again,
12 some of the same concerns: where that process
13 took place; how it would take place; what type
14 of weapon would be used; how you control for
15 ricochet; how you can -- you know, how you
16 prepare the staff to carry out such an event;
17 how many staff would be required; what kind of
18 environment, physical plant, you would need to
19 carry out that process.

20 Tennessee is not in a position to
21 carry out execution with a single bullet to the
22 back of the head. And then I would also
23 clarify that these -- in this method that the
24 State Legislature does not approve that here in
25 Tennessee.

1 BY MR. KURSMAN:

2 Q. And have you looked to any protocols to
3 see how execution by a single bullet to the
4 back of the head operates?

5 A. I'm not aware of any protocols for a
6 single bullet to the back of the head operates.
7 But to answer your question, no.

8 Q. Okay. So just so I'm clear, TDOC has
9 never looked into how to carry out an execution
10 by firing squad; is that right?

11 A. That's correct.

12 Q. Okay. And TDOC has never looked into how
13 to carry out an execution by a single bullet to
14 the back of the head?

15 A. That's correct.

16 Q. Has TDOC looked at a euthanasia oral
17 cocktail to serve as its protocol for
18 executions?

19 A. We have not.

20 Q. Do you believe that TDOC could administer
21 a lethal oral cocktail?

22 MR. MITCHELL: Object to the form.

23 THE WITNESS: No. Because again,
24 there's too many -- there would be too many
25 unanswered questions at this point. Processes

1 that would have to be established, if possible,
2 to carry out such an event. Obviously, I mean,
3 there's many questions I would have as
4 commissioner and the State would have as the
5 Department of Corrections as to how that would
6 be accomplished.

7 BY MR. KURSMAN:

8 Q. So just so I understand your answer, TDOC
9 believes that it could not -- it could not
10 administer a lethal oral cocktail for use in
11 executions?

12 A. We can't without knowing the answers to
13 the questions that the Department would have as
14 to how that would be carried out in a safe,
15 humane manner, as well as the -- the
16 environment that that would take place in, the
17 controls of the inmate, the particulars of that
18 type of event. No, we would not be able to.

19 Q. Okay. So I'm hearing two different
20 answers. I'm just trying to understand which
21 one's right. Is it your testimony that TDOC
22 doesn't know whether you could administer an
23 execution by lethal oral cocktail; or that, no,
24 it couldn't do it?

25 A. TDOC's answer would be, no, we couldn't

1 do it. Because we don't know the specifics of
2 how this is carried out, nor do we even know
3 where you would begin with a process such as
4 that.

5 Q. Okay. And what if you did have those
6 specifics --

7 MR. MITCHELL: Objection.

8 BY MR. KURSMAN:

9 Q. -- then do you believe you could carry
10 out an execution by oral cocktail?

11 MR. MITCHELL: Object to the form.

12 THE WITNESS: That would be very --
13 to answer that would be very -- using
14 speculation to the highest degree. Again,
15 depending on the answers to some of these --
16 some of these concerns and questions, it would
17 be hard to say.

18 BY MR. KURSMAN:

19 Q. Let's say a protocol essentially said you
20 can give an inmate a cup of fruit juice filled
21 with lethal injection chemicals, would TDOC be
22 able to give an inmate a cup of fruit juice?

23 MR. MITCHELL: Form objection.

24 THE WITNESS: TDO -- I -- you know,
25 TDOC -- let's assume TDOC could give an inmate

1 a fruit juice. Whether or not the inmate drunk
2 the fruit juice would be another issue. How
3 you would control the inmate, how you would
4 protect the staff from him throwing the fruit
5 juice that had lethal chemicals in it on
6 someone. There's a lot of questions there that
7 would have to be addressed and concerns that
8 would have to be addressed.

9 So when I say that we could not, we
10 would not unless we were confident that all
11 those issues were addressed and it was a safe
12 process.

13 BY MR. KURSMAN:

14 Q. Has TDOC -- is TDOC able to force an
15 inmate to take medication?

16 MR. MITCHELL: Object to the form.

17 THE WITNESS: TDOC is available --
18 does have means available to force-medicate
19 individuals, yes, through -- through drugs that
20 are injected in most cases into an individual.

21 BY MR. KURSMAN:

22 Q. So if the TDOC has the ability to
23 force -- forcefully medicate individuals, why
24 does it believe it could not forcefully give
25 individuals an oral cocktail?

1 MR. MITCHELL: Same objection.

2 THE WITNESS: Again, without knowing
3 the specifics of how that would be
4 accomplished, it would be hard to say. I'm
5 just -- I'm -- I want to make sure I'm clear.
6 Again, our concern is not just that the inmate
7 receives the cocktail by drinking it, it's how
8 we do that. How that process is carried out.
9 What prevents the inmate from using it as a
10 weapon on someone. Is it -- and we're not
11 talking about a process where the drug is
12 injected into an individual. We're talking
13 about somebody that drinks the cocktail. So
14 it's different.

15 But again, it's hard for -- it's hard
16 for the State to say that we would definitely
17 be able to do that without knowing the details.

18 BY MR. KURSMAN:

19 Q. Right.

20 And I want to make sure you're clear,
21 too. That's why I'm trying to figure out if
22 you're saying TDOC couldn't do this or TDOC is
23 just unaware whether they couldn't do it
24 because they don't know the details of how to
25 do it?

1 A. My -- the State's answer would be that we
2 could not at this point. Because again, we
3 know not enough about the process or even where
4 to begin with establishing a clear and concise
5 protocol that is safe, that controls for all
6 the things that we've talked about.

7 Q. Sure.

8 So you could not tomorrow. But could
9 you if you educated yourself on the process?

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: Again, until we
12 understand the process -- educating ourself on
13 the process is one thing. But what we find in
14 determining what it would require to do, that
15 is still unknown. And without knowing that,
16 it's hard to say that we definitely could.

17 BY MR. KURSMAN:

18 Q. Okay. I understand.

19 Has TDOC considered removing the
20 paralytic in its current three-drug protocol?

21 A. No, we haven't.

22 Q. Why not?

23 A. As I stated earlier, that the State's
24 position is that we believe the three-drug
25 protocol is effective, it's efficient in its

1 intended use, and that we have no reason to
2 modify the protocol.

3 Q. Has anyone that you've spoken to tell
4 you that this -- told you that the second drug
5 is necessary in the three-drug protocol to
6 effectuate death?

7 A. No.

8 Q. Is TDOC aware that removing the paralytic
9 may help with the consciousness check?

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: No.

12 BY MR. KURSMAN:

13 Q. Is TDOC aware that removing the paralytic
14 may help the prisoner show signs of distress if
15 he can still feel pain from the third drug?

16 MR. MITCHELL: Same objection.

17 THE WITNESS: Would you repeat the
18 question, please? I'm sorry.

19 BY MR. KURSMAN:

20 Q. Sure.

21 A. I'm sorry.

22 Q. Sure.

23 Is TDOC aware that removing the
24 paralytic would help to allow the prisoner to
25 show signs of distress if he can feel the third

1 drug?

2 MR. MITCHELL: Form objection.

3 THE WITNESS: TDOC understands that
4 the second drug is the paralytic. And that
5 once that drug is onboard and active, that the
6 inmate -- it paralyzes the inmate. We think
7 it's very relevant that the consciousness check
8 is done prior to the paralytic being onboard.
9 And that the determination is made at that
10 point that the inmate is unconscious before the
11 paralytic is put onboard.

12 So again, we feel like that the
13 vecuronium is an important part of the
14 three-drug protocol that we use.

15 BY MR. KURSMAN:

16 Q. Is TDOC concerned that the paralytic may
17 make an inmate regain consciousness, but they
18 won't be able to show signs of distress because
19 they will be paralyzed at that point?

20 MR. MITCHELL: Object to the form and
21 scope of the notice.

22 THE WITNESS: TDOC, again, is
23 confident that the vecuronium in conjunction
24 with the midazolam and the potassium chloride
25 hastens death in this case, in which the object

1 of this protocol is to put the inmate to death.
2 And that it hastens death; and therefore, is
3 necessary for the three-drug protocol.

4 BY MR. KURSMAN:

5 Q. But my question is a bit different. My
6 question is, is TDOC concerned that the second
7 drug in the protocol, the vecuronium bromide,
8 may cause the inmate to regain consciousness as
9 defined in the protocol, but the inmate will
10 not be able to show signs of distress because
11 they are paralyzed?

12 MR. MITCHELL: Form objection. Scope
13 of the notice objection.

14 You can answer.

15 THE WITNESS: TDOC, again, is
16 confident that the three-drug protocol that we
17 use renders the inmate unconscious at the
18 beginning with the first drug, the midazolam.
19 And that the vecuronium only aids in the
20 process of putting the inmate to death by
21 paralyzing the inmate, stopping his breathing,
22 which, again, hastens death. It ensures death
23 at a faster rate. And with the potassium
24 chloride as the third drug that stops the
25 heart.

1 BY MR. KURSMAN:

2 Q. How much faster does TDOC believe that
3 the second drug will cause death as compared to
4 just a two-drug protocol?

5 A. I don't know that TDOC has a particular
6 timeline. We do know that as a -- again, as a
7 paralytic, by stopping the breathing of an
8 individual within a few minutes, that obviously
9 if you're not breathing, drawing breath, you're
10 -- it hastens death. And helps achieve the
11 goal of putting someone to death.

12 Q. So why does TDOC use the third drug then?

13 A. To stop the heart.

14 Q. Okay. So the second drug is, per your
15 testimony, to stop breathing?

16 A. Correct.

17 Q. And the third drug is to stop the heart?

18 A. Correct.

19 Q. Both of those drugs individually, per
20 your testimony, could kill the inmate, right?

21 A. They could.

22 And it's important to point out that,
23 you know, it's very possible that the inmate
24 expires before the potassium chloride goes
25 onboard. It's possible that the inmate expires

1 before the vecuronium in some cases goes
2 onboard. I mean, that's possible.

3 Q. So you -- TDOC believes that the inmate
4 could die from just injection of the first
5 drug?

6 A. I think it's -- I think TDOC would say
7 that there's -- it's always possible. But
8 certainly the midazolam at the high dosage that
9 we provide, as well as bringing the vecuronium
10 onboard in some cases, that we believe that
11 it's possible the inmate has expired before the
12 potassium chloride is administered.

13 Q. Has any doctor or expert that you've
14 consulted with told you that they believe that
15 midazolam alone would cause the death of an
16 inmate?

17 A. No.

18 Q. Okay. So why does TDOC believe that's
19 possible?

20 A. Well, I just think that with the high
21 dosage that we provide, as well as the -- with
22 the second drug -- let me be clear. With the
23 second drug that stops the breathing, based on
24 observations that the Department of Corrections
25 has had with our executions, that that is very

1 possible that the inmate is expired before the
2 third drug goes onboard.

3 Q. But what about before the second drug?

4 A. You know, that's a fair -- a fair
5 question. I don't know so much about the first
6 drug, but certainly by the time the second drug
7 takes full effect.

8 Q. Has any expert that you've relied on told
9 you that the three-drug protocol would work
10 faster than a two-drug -- midazolam, potassium
11 chloride -- protocol?

12 A. No.

13 Q. Okay. So why does TDOC believe that a
14 three-drug protocol would work faster than the
15 two-drug protocol?

16 MR. MITCHELL: Object to the form.

17 You can answer.

18 THE WITNESS: I don't have a reason
19 to believe one would work faster than the
20 other. I'm just saying I believe that the
21 three-drug protocol that we currently use is
22 sufficient to putting an inmate to death.

23 BY MR. KURSMAN:

24 Q. So maybe I'm confused. Because I thought
25 what you said was that the reason for the

1 second drug was that it hastens death?

2 A. It does.

3 Q. Are you saying that's compared to a
4 two-drug -- midazolam, potassium chloride --
5 protocol?

6 A. No. Not comparing one to the other. I'm
7 not saying that. I'm just saying that the
8 three-drug protocol that we currently use has,
9 in the State's opinion, performed flawlessly.
10 And that it has performed its function in the
11 lethal injection process.

12 Q. So my question to you, though, is why not
13 just take out the second drug and inject with
14 the midazolam and then the potassium chloride?

15 A. Well, again, because the process that
16 we're using currently has been effective, and
17 it's used in other states. We -- we have
18 confidence in this protocol, and we see no need
19 to make that change.

20 Q. Would you have confidence in the two-drug
21 protocol being midazolam and potassium
22 chloride?

23 MR. MITCHELL: Object to the form and
24 beyond the scope of the notice.

25 You can answer.

1 THE WITNESS: And again, the State
2 would argue that our three-drug protocol is
3 sufficient. It has worked flawlessly, in our
4 opinion. It works -- it has worked in other
5 states. It's used in other states. And that
6 we would not change from the three-drug to a
7 two-drug protocol.

8 BY MR. KURSMAN:

9 Q. Right. But would you have confidence in
10 a two-drug protocol, a two-drug protocol being
11 midazolam and potassium chloride?

12 MR. MITCHELL: Same objections.

13 THE WITNESS: Again, I can't say that
14 we would because we haven't used it. We've
15 used the drug -- the protocol that we currently
16 have on place -- in place and that it has
17 performed without exception.

18 BY MR. KURSMAN:

19 Q. Does TDOC believe that the third drug in
20 the protocol will cause an inmate's death?

21 MR. MITCHELL: Object to the form.

22 You can answer.

23 THE WITNESS: TDOC believes that the
24 third drug would stop the heart. Obviously,
25 after stopping the heart you would -- the

1 individual would expire in -- after that.

2 BY MR. KURSMAN:

3 Q. And does TDOC believe that the first drug
4 in that protocol, midazolam, would cause an
5 inmate to be unconscious as defined in the
6 protocol?

7 A. Yes.

8 Q. Okay. So if you have a drug that is
9 causing an inmate to be unconscious as defined
10 in the protocol and then a drug that will stop
11 the inmate's heart and kill them, why would
12 TDOC not be confident that a two-drug protocol
13 of midazolam and potassium chloride would be
14 sufficient to execute an inmate?

15 MR. MITCHELL: Form, scope of notice
16 objection.

17 You can answer.

18 THE WITNESS: I don't know that we
19 wouldn't be confident that it would --
20 sufficient for execution purposes. Again,
21 we're very confident in the current method that
22 we use, the three-drug protocol, that has
23 worked and is used in other states that
24 performs adequately.

25 So, you know, again, to say that

1 we're not confident that it might render
2 someone dead, I'd be -- not be appropriate to
3 say that probably. But we are fully confident
4 in our current protocol.

5 BY MR. KURSMAN:

6 Q. Right. And I've heard that numerous
7 times. But my questions are different. Mine
8 are about the two-drug protocol, whether you'd
9 be confident in that protocol. I've heard that
10 you're confident in the three-drug protocol. I
11 want to know if TDOC would be confident in the
12 two-drug protocol, being midazolam followed by
13 potassium chloride?

14 A. Again --

15 MR. MITCHELL: Object to the form.
16 Beyond the scope of the notice.

17 THE WITNESS: Again -- yeah. TDOC --
18 it's hard to say that we would be 100 percent
19 confident in that protocol. We haven't used
20 it.

21 BY MR. KURSMAN:

22 Q. Why?

23 A. We've used the three-drug protocol.

24 Q. Why wouldn't you be 100 percent confident
25 in that protocol?

1 A. Because --

2 MR. MITCHELL: Same objection.

3 THE WITNESS: Because again, we have
4 not used the protocol. We have not used the
5 protocol. We've used the protocol, the
6 three-drug protocol, that has been used in
7 other states, that we are confident in and that
8 we have used without issues.

9 BY MR. KURSMAN:

10 Q. Were you 100 percent confident in your
11 three-drug protocol before you used it in
12 execution -- for executions in Tennessee?

13 MR. MITCHELL: Same objections.

14 THE WITNESS: I was as confident as
15 we could be based on the availability of the
16 drugs that we could find, as well as the
17 three-drug protocol being used in other states.
18 And by -- in other states with people that I
19 had communications with that I trusted as
20 reliable sources.

21 BY MR. KURSMAN:

22 Q. And is TDOC less confident in a two-drug
23 protocol than the current three-drug protocol?

24 MR. MITCHELL: Same objections.

25 THE WITNESS: Yes.

1 BY MR. KURSMAN:

2 Q. Why?

3 A. Because we haven't used it. And because
4 the fact that we're confident that the current
5 method that we're using is adequate to carry
6 out executions in Tennessee.

7 Q. Okay. But we just discussed a second ago
8 that midazolam, in TDOC's opinion, would cause
9 the inmate to be unconscious, right?

10 A. Right.

11 Q. And potassium chloride, in TDOC's
12 opinion, causes the inmate's heart to stop,
13 right?

14 A. Correct.

15 Q. So based on those two opinions by TDOC,
16 why would TDOC be any less confident that a
17 two-drug protocol could effectuate death, as
18 compared to the three-drug protocol with the
19 paralytic?

20 MR. MITCHELL: Again, I'm going to
21 object to the form. I'm also going to object
22 it goes beyond the scope of the notice.

23 THE WITNESS: Okay. So it's the same
24 answer that I've already given. We haven't
25 used it. We're familiar with the protocol

1 we're using that we adopted that has worked
2 without exception in Tennessee, and it has been
3 used in other states.

4 BY MR. KURSMAN:

5 Q. Would TDOC use the two-drug protocol if
6 they could not obtain vecuronium bromide?

7 MR. MITCHELL: Same objections.

8 THE WITNESS: That would be something
9 we would have to consider at the time and
10 evaluate. Again, with the drugs that are
11 available now, we feel like the three-drug
12 protocol is appropriate, and that would be our
13 choice.

14 BY MR. KURSMAN:

15 Q. But if vecuronium bromide was not
16 available, would TDOC feel comfortable
17 proceeding with a two-drug protocol?

18 MR. MITCHELL: Form objection. Scope
19 of the notice objection.

20 THE WITNESS: If we could not obtain
21 the drugs that were currently approved in our
22 protocol, by state law we would -- I would
23 certify to the Governor that I couldn't receive
24 those drugs, and we would rely on the
25 alternative method of execution.

1 BY MR. KURSMAN:

2 Q. Being the two-drug protocol? Is that
3 what you're saying?

4 A. Well, we would have to -- we would have
5 to explore that. We would have to look for --
6 make a decision at that time regarding the
7 protocol, much like we did with pentobarbital.

8 But, you know, I would be speculating
9 as to what would happen. Or there would be
10 conversation, of course, with the State, with
11 the administration, with the Attorney General's
12 office in looking at our protocol to see what
13 kind of adjustments would have to be made.

14 Q. Well, if TDOC only had midazolam and
15 potassium chloride, why would it not go forward
16 with executions with only those two drugs?

17 MR. MITCHELL: Form objection. Scope
18 and notice objection.

19 THE WITNESS: I don't know that we
20 would not. I'm just saying that if we could
21 not get vecuronium, obviously, we would have to
22 re-evaluate the protocol as we did when we
23 could not obtain pentobarbital.

24 BY MR. KURSMAN:

25 Q. Does TDOC understand that taking

1 vecuronium bromide out of the current protocol
2 adds an additional safeguard to this protocol,
3 being that the inmate can respond if he feels
4 the pain of the third drug?

5 MR. MITCHELL: Same objections.

6 THE WITNESS: TDOC understands that
7 the purpose of vecuronium -- the results of
8 vecuronium and how it relates to the protocol,
9 whether or not it's a safeguard or not, I --
10 would probably be debatable.

11 BY MR. KURSMAN:

12 Q. Did you ask any experts what the
13 preferred method would be, whether it would be
14 the three-drug protocol or the two-drug
15 protocol that we've been discussing?

16 A. Experts being?

17 Q. Doctors.

18 A. No.

19 Q. Pharmacists?

20 A. Again, there was -- the State consulted
21 with different people in developing our
22 protocol. Some of those people were
23 pharmacists and -- but in regard to specific
24 questions of whether or not vecuronium is
25 included or not, I'm not familiar with that.

1 Q. Well, why didn't you ask any of those
2 people whether a two-drug protocol would be
3 more appropriate than a three-drug protocol?

4 A. Well, again, we considered the drugs that
5 were available, the drugs -- the protocols that
6 were being used in other states successfully,
7 and the determination was made to go with the
8 three-drug protocol.

9 Q. Right. But we have the drugs available,
10 both for the three drugs. Of course, you have
11 them. And we also have them available for the
12 two drugs because they are in the three drugs.
13 We're just taking out the paralytic.

14 So the question is, why didn't you
15 ask these experts that you were relying on
16 whether it would be more appropriate or more
17 humane to execute just using these two drugs
18 rather than these three drugs?

19 MR. MITCHELL: Object to the form.

20 THE WITNESS: Again, I don't know
21 that that was not discussed. What I do know is
22 that the decision was made to use the
23 three-drug protocol that we currently have in
24 place using vecuronium.

25 ///

1 BY MR. KURSMAN:

2 Q. Can you go to page 10 of Exhibit 1?

3 MR. SUTHERLAND: Page what? I'm

4 sorry.

5 MR. KURSMAN: Exhibit 1. I'm sorry.

6 BY MR. KURSMAN:

7 Q. And do you see this is --

8 A. I'm sorry. I'm on Exhibit 10.

9 Q. I'm sorry. Page 10 of Exhibit 1. It
10 will be a diagram of the --

11 A. I see.

12 Okay.

13 Q. Do you see the diagram?

14 A. I do.

15 Q. Can you explain to me who from the
16 execution team is where during an execution?

17 MR. MITCHELL: Object to the form.

18 You can answer.

19 THE WITNESS: So you have -- the
20 condemned is usually in Cell 1 in the
21 deathwatch area. Do you see that?

22 BY MR. KURSMAN:

23 Q. Uh-huh.

24 A. Now, are you talking about during the
25 execution itself or during deathwatch?

1 Q. I apologize.

2 A. I just want to make sure I --

3 Q. During the execution itself.

4 A. During the execution itself, sure.

5 So, yes, during the lethal injection
6 process, the executioner, members of the IV
7 team are in the lethal injection executioner's
8 room. The inmate is located on the gurney in
9 front of the executioner's room.

10 The warden and the assistant
11 commissioner -- I mean, the assistant warden of
12 security is in the execution chamber. The
13 official witnesses are located in the official
14 witness holding room, observation room. The
15 victim's family is located in the victim's
16 family observation room.

17 The EMTs and member of the IV team is
18 both located in the -- outside the
19 executioner's room, as well as in the
20 executioner's room in the execution chamber
21 during the process of applying the IVs.

22 Am I answering your question?

23 Q. You are.

24 A. Okay.

25 Q. So let's go to once the IVs are inserted.

1 The -- you said the EMTs are also in the lethal
2 injection executioner's room; is that right?

3 A. No.

4 Q. Okay.

5 A. I'm sorry. The EMTs are located -- they
6 go back into the area outside the lethal
7 injection executioner's room.

8 Q. Okay. So at this point the EMTs can't
9 see anything, right, in the execution chamber?

10 A. The EMTs are in that area there outside
11 the executioner's room. No.

12 Q. Okay. How many IV team members are in
13 the executioner's room?

14 A. Normally two to three.

15 Q. When you say normally two to three, is it
16 not the same for every execution?

17 A. It -- possibly not.

18 Q. Okay. Why wouldn't it be the same?

19 A. You may have -- so in -- in other words,
20 you have an IV team member that is outside the
21 room for whatever reason. You may have a --
22 you usually have two primary IV team members
23 inside the executioner's room. One to observe
24 the IV in each arm with the camera, another IV
25 team member to assist with and monitor the

1 drawing of the chemicals into the syringes and
2 that process.

3 Q. So just so I'm clear, there's --
4 you're -- there's the executioner and then two
5 or three additional IV team members in the
6 executioner's room? Is that what you're
7 saying?

8 A. Yes.

9 Q. Okay. So there's the executioner, who is
10 pushing the drugs and mixing the drugs, right?

11 A. Yes.

12 Q. There's the IV team member, who's known
13 as the recorder, who's assisting the
14 executioner?

15 A. Correct.

16 Q. Okay. And then there's the IV team
17 member who's observing the lines?

18 A. The process, yes.

19 Q. And then you said there's an additional
20 IV team member?

21 A. Correct.

22 Q. What is that additional IV team member
23 doing?

24 A. That person also assists with -- comes
25 out and helps in the preparation of the IV

1 lines being connected to the inmate, as well
2 as -- I don't want to say assist with the IVs
3 being connected to the inmate. That's the
4 EMT's job. But they assist with the taping of
5 the hands and things like that to assist the
6 EMT.

7 Q. Do any of the IV team members have
8 medical experience?

9 A. Not other than -- other than the EMTs?

10 Q. Other than the EMTs.

11 A. Yes. The -- no, they are -- other than
12 the training that they've received related to
13 their function in this role.

14 Q. Okay. And who trains the IV team members
15 relating to their functions in this role,
16 without disclosing the identity of that person?

17 A. The medical professionals that are
18 trained to provide training in IV preparation
19 and using IVs and the insertion of IVs and
20 using chemicals with IVs.

21 Q. And do those medical professionals train
22 every IV team member?

23 A. Those -- every IV team member has been
24 trained in that area of expertise.

25 Q. By who?

1 A. By the people who the Department provided
2 to provide that training.

3 Q. Are those people medical professionals?

4 A. Those people are medical professionals,
5 yes.

6 Q. Okay. Just so I'm clear, so medical
7 professionals train the executioner; is that
8 right?

9 A. Yes.

10 Q. Medical professionals train the observer?

11 A. Yes.

12 Q. Medical professionals train the recorder?

13 A. The second person in the IV room who is
14 recording the preparation of the chemicals and
15 watching, yes.

16 Q. And medical professionals train the last
17 IV team member, who is sometimes in the
18 executioner's room and sometimes is not?

19 A. Yes.

20 Q. Okay. Who is in the execution chamber
21 with the inmate while the drugs are being
22 pushed?

23 A. The warden and the assistant warden of
24 security.

25 Q. Does the warden leave the room at any

1 point, the execution chamber?

2 A. Not during the -- not during the process,
3 no.

4 Q. Okay. And who determines whether the
5 inmate is unconscious?

6 A. The warden makes that determination.

7 Q. Does anyone confirm that the prisoner is
8 unconscious, aside from the warden?

9 A. The warden makes that determination.

10 He's the one that performs the consciousness
11 check. Obviously the executioner and people in
12 the executioner's room can observe the inmate,
13 but the warden is the one who performs the
14 consciousness check and gives the order to
15 proceed or not proceed with the execution.

16 Q. What happens if the inmate is declared
17 unconscious and then appears to move again?

18 MR. MITCHELL: Object to the form.

19 THE WITNESS: The warden would move
20 to the alternative, where the inmate
21 appeared -- or the inmate presented signs of
22 being conscious and would go to the second set
23 of chemicals.

24 BY MR. KURSMAN:

25 Q. Okay. What if the inmate is declared

1 unconscious, the executioner starts
2 administering the second drug, and the inmate
3 moves, what's supposed to happen then?

4 MR. MITCHELL: Form objection.

5 THE WITNESS: Again, the warden would
6 have the process moved to the second set of
7 chemicals.

8 BY MR. KURSMAN:

9 Q. And by the second set, do you mean the
10 midazolam again?

11 A. Right. And starting over with the
12 midazolam.

13 Q. Okay. So just so I'm clear. So if the
14 prisoner gets 500 milligrams of midazolam and
15 then receives vecuronium bromide and moves, the
16 warden then instructs the executioner to give
17 more midazolam?

18 MR. MITCHELL: Form objection.

19 THE WITNESS: If the -- if the inmate
20 is given midazolam and there's a consciousness
21 check and then the inmate were to give an
22 indication after the consciousness check that
23 they're -- that he'd become conscious, then
24 they would move to the second set of --

25 ///

1 BY MR. KURSMAN:

2 Q. Right. I get that. But my question
3 is -- so it's a bit confusing, so I
4 apologize -- is what if the warden does the
5 consciousness check, there's no movement, and
6 the warden declares the inmate unconscious, and
7 then the second drug begins to be administered
8 and the inmate moves, what does the warden do
9 then?

10 MR. MITCHELL: Form objection.

11 THE WITNESS: Okay. I'm not trying
12 to be facetious. I just want to make sure I
13 understand.

14 The movement of the inmate --
15 obviously if you give him or her the midazolam,
16 the consciousness check is done. The inmate --
17 declares the inmate unconscious, but the inmate
18 is breathing. There's movement in -- with
19 breathing. I mean, you're talking about other
20 movement. You're talking about the inmate
21 moving in some --

22 BY MR. KURSMAN:

23 Q. (Nods head affirmatively.)

24 A. Again, you would defer to the second set
25 of chemicals and begin the process.

1 Q. So the -- just so I'm clear. So the
2 warden would instruct the executioner to go
3 back to the second set of midazolam?

4 A. Yes.

5 Q. Okay. Do you know who was in the
6 executioner's room during the Irick execution?

7 A. The executioner and members of the IV
8 team.

9 Q. Yeah. Which members of the IV team --

10 MR. MITCHELL: Object pursuant to the
11 protective order.

12 BY MR. KURSMAN:

13 Q. -- without identifying the IV team?

14 A. Yes, I do.

15 Q. Could you say which members the IV team?

16 MR. MITCHELL: Object pursuant to the
17 protective order. I'm not sure how that can be
18 done necessarily.

19 MR. KURSMAN: So -- right. So I --
20 the observer, the recorder, and the third
21 person who's inside or outside.

22 MR. MITCHELL: Sorry. My bad. My
23 bad.

24 THE WITNESS: Yes. So the observer,
25 the recorder, and it's my understanding the

1 third member -- that there was a third member
2 there.

3 BY MR. KURSMAN:

4 Q. Okay. And how about during the Johnson
5 execution?

6 A. It's my understanding that there was the
7 observer and the recorder.

8 Q. Why was the third member in the execution
9 room during the Irick execution but not during
10 the Johnson execution?

11 A. It's -- if I'm correct, if my
12 recollection is -- if my memory serves me
13 right, that part -- it's possible that that
14 person on the second execution no longer worked
15 for the Department.

16 Q. Why didn't TDOC decide to replace that
17 person before the Johnson execution?

18 A. No particular reason, other than the fact
19 that he wasn't replaced. That the -- the
20 duties and responsibilities that are required
21 there were sufficient with the people that were
22 there that day. It would be much like the same
23 scenario if one of the individuals became ill
24 or were not able to attend that night, that we
25 would ensure that we had the sufficient number

1 of team members to carry out the execution.

2 Q. And who at TDOC made that call, decided
3 not to replace that third IV team member?

4 A. That would -- that would be a decision
5 made by the warden and the -- and the
6 Department.

7 Q. The warden and the Department?

8 A. The warden and the Department. Because
9 obviously if you had another person there that
10 you wanted to replace, you would have to ensure
11 that the training and all had taken place and
12 the person was available to do that -- perform
13 those duties. We would not just take
14 someone -- pick someone and put them in that
15 -- in that space to perform those duties.

16 Q. Who selects members of the execution
17 team?

18 A. The members of the execution team are --
19 many of them -- some of them are selected based
20 on their position in the Department. Obviously
21 the warden, associate warden of security.
22 Particular members of the facility level are
23 selected, again, by the warden with input,
24 probably from the assistant commissioner of
25 prisons.

1 Q. And do you know how he selects those
2 members for the execution?

3 A. I do.

4 Q. Okay. Can you describe that?

5 A. Those -- those requirements and
6 specifications, if you call it that, are listed
7 in the protocol. And based on the individual's
8 integrity, their ability to maintain
9 confidentiality, their professional conduct,
10 their demeanor, their years of service, things
11 like that.

12 Q. Okay. Before we go any further, how many
13 total members -- current members of the IV team
14 are there right now?

15 A. Excluding the EMTs, currently three.

16 Q. And does that include the executioner?

17 A. No.

18 Q. So the executioner plus three IV team
19 members?

20 A. (Nods head affirmatively.)

21 Q. Okay. And does anyone on the execution
22 team have medical experience?

23 A. Other than -- no. Not professional
24 medical experience to the fact that they're a
25 trained medical professional, other than if you

1 consider the physician. But again, the
2 physician's not listed as in that group.

3 So, no, the IV team members, the
4 executioner, they are not medical
5 professionals, no.

6 Q. Why is TDOC -- why did TDOC decide to use
7 people who don't have medical experience to
8 serve as the IV team members in an execution?

9 A. In some cases medical professionals are
10 resistant to that process because of the oath
11 that they take as medical professionals.
12 Again, finding people who are able to carry out
13 the duties and the responsibilities that are
14 appropriately trained by medical professionals
15 to carry out those responsibilities is the
16 method we use.

17 Q. Did TDOC ask an EMT if they would be
18 willing to serve as the executioner?

19 A. No.

20 Q. Why?

21 A. The executioner that we have in place has
22 been in place for several years and has
23 performed the executions in the state. And we
24 would see no need to do that.

25 Q. Right.

1 So the executioner has performed
2 executions with pentobarbital, right?

3 A. Correct.

4 Q. And the executioner performs --

5 A. Oh, that -- I'm not sure about the
6 pentobarbital.

7 Q. Okay. But the executioner performs
8 executions with electrocution, right?

9 A. Yes.

10 Q. Okay. Why did TDOC think it was
11 appropriate to use the same executioner who
12 performs the electrocution executions to also
13 perform executions using the three-drug
14 protocol?

15 MR. MITCHELL: Object to the form.

16 THE WITNESS: The executioner has
17 used lethal injection drugs before in
18 executions. And he's a -- they have also
19 used -- he's been -- that person has been the
20 executioner in executions using the electric
21 chair. That person has performed in that
22 role/responsibility with a high level of
23 integrity and service to the State. Conduct
24 has been exceptional and very reliable and very
25 dependable. We would have no reason to change

1 executioners.

2 BY MR. KURSMAN:

3 Q. Did you -- did you ask any medical
4 professional whether it was appropriate to use
5 a nonmedical professional to push drugs into an
6 inmate?

7 A. I did not.

8 Q. Did anyone at TDOC?

9 A. Not that I'm aware of.

10 Q. Did you ask the physician who's part of
11 the execution team whether he would serve -- he
12 or she would serve as the executioner?

13 MR. MITCHELL: Object to the form.

14 THE WITNESS: I did not.

15 BY MR. KURSMAN:

16 Q. Okay. Does TDOC believe that a physician
17 would be more equipped to serve as the
18 executioner than the person who currently
19 serves as the executioner?

20 MR. MITCHELL: Object to the form and
21 the scope of the notice.

22 THE WITNESS: I do not. We do not.

23 BY MR. KURSMAN:

24 Q. You believe -- TDOC believes that the
25 executioner that it currently uses is more --

1 is as qualified as a physician to push drugs
2 into an inmate?

3 MR. MITCHELL: Same objections.

4 THE WITNESS: I would not say that,
5 more qualified. Obviously a medical doctor
6 would have qualifications that a nonmedical
7 professional would not have. But again, for
8 the reasons that I've already stated, the
9 executioner that is currently used has
10 performed those roles adequately and in a
11 professional manner. And we would not change
12 that protocol and go to -- or ask a doctor to
13 do that process.

14 BY MR. KURSMAN:

15 Q. And why wouldn't TDOC ask a doctor to
16 perform the role of the executioner?

17 MR. MITCHELL: Form objection.
18 Beyond the scope of the notice objection.

19 THE WITNESS: There again -- again,
20 the process of executing an inmate, I don't
21 know that you -- I -- that process currently is
22 being carried out by an individual who works
23 for the Department of Corrections; that serves
24 in that role -- has served in that role for
25 many years and performed that role without

1 issue, is reliable, is considered very
2 dedicated to the Department in service of the
3 State of Tennessee. He has no -- first of all,
4 he has no oath of a medical professional. Most
5 doctors -- all doctors do.

6 And that -- the role of executioner,
7 he is being -- that role is being performed
8 by -- without flaw by this individual. We
9 would have no reason to change or ask a doctor
10 or a nurse or an EMT or anyone else to do that
11 role.

12 BY MR. KURSMAN:

13 Q. How does TDOC know that that role is
14 performed without flaw?

15 MR. MITCHELL: Object to the form.

16 THE WITNESS: By observation and
17 the -- the results of the execution process and
18 the individual's role as executioner, the
19 observation of that. And knowing the -- his
20 duties and how he carried out those duties.

21 BY MR. KURSMAN:

22 Q. Well, who oversees the execution to
23 ensure that he's carrying out those duties
24 correctly?

25 A. The warden is responsible for that.

1 Q. Who watches the executioner as he pushes
2 the drugs into the inmate?

3 A. Well, the people that's in the room see
4 the executioner -- or with the executioner.
5 The warden does not physically see the person
6 as he's pushing the drugs. But obviously, the
7 warden is aware of the situation at hand and
8 sees the individual that the drugs are being
9 pushed into, observes the process, and is aware
10 of the protocol being followed.

11 Q. And does the warden have any medical
12 training?

13 A. No.

14 Q. And do the IV team members who are
15 overseeing the executioner, do they have any
16 medical training?

17 A. They have the training that's been
18 provided related to use of IVs and the IV lines
19 and all.

20 Q. And it's TDOC's position that the IV team
21 members are trained by qualified medical
22 professionals?

23 A. Yes.

24 Q. Okay. What is TDOC's position on the
25 executioner's qualifications to reconstitute

1 the drugs?

2 A. It's our position that he has received
3 adequate training and is -- has and is
4 performing those duties as directed.

5 Q. Who's trained the executioner to
6 reconstitute the drugs?

7 A. The pharmacist that we have a contract
8 with has provided the instructions to the
9 executioner, and the executioner has used those
10 instructions in the reconstituting of the
11 drugs.

12 Q. Does TDOC believe that the executioner
13 has written instructions for midazolam?

14 A. Yes.

15 Q. Does TDOC believe the executioner has
16 written instructions for vecuronium bromide?

17 A. Yes.

18 Q. Does TDOC believe the executioner has
19 written instructions for potassium chloride?

20 A. Yes.

21 Q. Okay. Does TDOC believe that the other
22 IV team members have seen all three of those
23 written instructions?

24 A. I don't know that every member of the IV
25 team has received those -- or has seen those

1 instructions. But the executioner is the
2 individual who mixes the drug and reconstitutes
3 the vecuronium.

4 Q. How about the IV team member who is
5 supposed to oversee the execution, has that
6 person seen the written instructions for the
7 vecuronium bromide?

8 A. Yes.

9 MR. MITCHELL: Object to the form.

10 BY MR. KURSMAN:

11 Q. What is TDOC's position on whether the
12 executioner is qualified to administer an IV
13 push?

14 A. Our position is that he is qualified and
15 capable to perform an IV push.

16 Q. And what qualifies the executioner to do
17 that?

18 A. His training, as well as his experience.

19 Q. And who is training the executioner,
20 without identifying any names to perform an IV
21 push?

22 A. Medical professionals.

23 Q. And how does the executioner train -- how
24 does an executioner know the appropriate, like,
25 push rate?

1 MR. MITCHELL: Object to the form.

2 THE WITNESS: Define IV push rate.

3 BY MR. KURSMAN:

4 Q. The rate at which the executioner is
5 supposed to push the drugs.

6 MR. MITCHELL: Same objection.

7 THE WITNESS: The rate that he pushes
8 the drug is in a slow, steady push. I think he
9 will tell you that that rate could vary
10 depending on the individual. The executioner
11 was trained to recognize push rates that are
12 not -- are push -- IV push that is not normal,
13 that meets resistance, to recognize that. He
14 also is trained to recognize a slower natural
15 push rate versus a higher natural push rate,
16 depending on the individual, the size of the
17 vein, the makeup of the individual, as opposed
18 to an IV that may be not inserted correctly in
19 the vein and into the tissue, as well as to
20 recognize the signs -- the physical signs on
21 the individual.

22 BY MR. KURSMAN:

23 Q. And who has trained the executioner to
24 recognize those signs?

25 A. A medical professional.

1 Q. And what expertise does that medical
2 professional have?

3 A. They have training in IV and -- both IV
4 insertion and the use of IVs.

5 Q. Why didn't TDOC ask that person to serve
6 as the executioner?

7 A. For the same reasons already stated. We
8 have an executioner that has performed
9 flawlessly, that does the job that's required
10 to do. And we see no reason to change that.

11 Q. Let's go to page --

12 MR. MITCHELL: Oh, can we go off
13 record?

14 MR. KURSMAN: Sure.

15 Can we go off the record for a
16 minute?

17 THE VIDEOGRAPHER: One moment,
18 please. Going off the record at 3:13 p.m.

19 (Short break.)

20 THE VIDEOGRAPHER: Back on the record
21 at 3:22 p.m.

22 BY MR. KURSMAN:

23 Q. Before we went on break, we were talking
24 about the IV team members. Are the IV team
25 members trained to assess the inmate's

1 consciousness?

2 MR. MITCHELL: Objection to the form.

3 THE WITNESS: The IV team members are
4 not -- are not responsible for the
5 consciousness check; although, they are aware
6 of the consciousness check. And one of those
7 IV team members documents within the -- within
8 the executioner's room the responses of the --
9 any responses of the consciousness check.

10 BY MR. KURSMAN:

11 Q. Are they trained to assess for
12 consciousness?

13 A. No. The warden is the one responsible to
14 assess consciousness.

15 Q. Let's turn to page 19 of Exhibit 1. Do
16 you see at the top it says physician?

17 A. I do.

18 Q. And Number 5 says to pronounce death. Do
19 you see that?

20 A. I do.

21 Q. Did TDOC ask the physician if they would
22 be willing to be the person who does the
23 consciousness check?

24 A. No.

25 Q. Why?

1 A. Because the warden was the one selected
2 for that process.

3 Q. Does TDOC believe that the physician is
4 more qualified than the warden to perform a
5 consciousness check?

6 MR. MITCHELL: Object to the form and
7 the scope of the notice.

8 THE WITNESS: The warden -- TDOC
9 would acknowledge certainly that a physician
10 has -- would have more specific training
11 relating to consciousness than the warden. But
12 we chose the warden as the individual who would
13 conduct the consciousness check.

14 BY MR. KURSMAN:

15 Q. If TDOC believes that the physician has
16 more expertise as it relates to a consciousness
17 check, why did TDOC choose the warden over the
18 decision to perform the consciousness check?

19 MR. MITCHELL: Same pair of
20 objections.

21 THE WITNESS: We feel the warden is
22 adequate to make the determination if the
23 inmate is conscious. To determine if the
24 inmate is unconscious, there's also a question
25 of -- and during that process of

1 confidentiality and protecting the physician's
2 identity to that consciousness check is
3 conducted. People are there, obviously. The
4 curtains are open and the physician is in the
5 back. To do that you would have to bring the
6 physician out in that -- in that area.

7 BY MR. KURSMAN:

8 Q. Did you consult with any experts about
9 who should perform the consciousness check?

10 A. We consulted with a physician who worked
11 with the warden in training the warden how to
12 perform a consciousness check.

13 Q. And was it the physician's opinion that
14 the warden should be doing the consciousness
15 check over a physician?

16 MR. MITCHELL: Object to the form and
17 the scope of the notice.

18 THE WITNESS: No. It was the
19 Department's decision to use the warden to do
20 the consciousness check.

21 BY MR. KURSMAN:

22 Q. And why did the Department make that
23 decision?

24 A. Again, the Department felt like the
25 warden could make that decision based on the

1 training that he would receive from a
2 physician. And considering the need to protect
3 the identity of the physician that was involved
4 in the process.

5 Q. Is that physician an anesthesiologist?

6 A. No.

7 Q. Does that physician regularly do
8 consciousness checks?

9 A. Possibly. But I don't know that they do
10 a consciousness check every day, obviously. I
11 think the physician that provided the training
12 is certainly qualified to determine whether
13 somebody is conscious or not.

14 Q. Did TDOC look into the background of that
15 physician that's providing the training to the
16 warden?

17 A. TDOC would be familiar -- let me ask for
18 a clarification when you say background.

19 Q. Sure. I apologize.

20 Did TDOC ask that physician how many
21 consciousness checks that physician performed
22 during his or her career?

23 A. Not to my --

24 MR. MITCHELL: I'm going to object.

25 That's beyond the scope of the notice.

1 THE WITNESS: Not to my knowledge.

2 BY MR. KURSMAN:

3 Q. Okay. Did the physician tell TDOC that
4 the warden was qualified to perform a
5 consciousness check?

6 MR. MITCHELL: Same objection, as
7 well as a form objection.

8 THE WITNESS: The physician was
9 confident that the warden was appropriately
10 trained to determine if the inmate was
11 unconscious or not.

12 BY MR. KURSMAN:

13 Q. Did TDOC ask an anesthesiologist whether
14 it was appropriate to use the warden to
15 determine the consciousness check?

16 A. We did not.

17 Q. Why not?

18 A. We felt that the training and the
19 instructions from the physician to the warden
20 to determine -- to prepare the warden to make a
21 decision based on his observations and the
22 elements of the consciousness check, that it
23 was sufficient to determine if the inmate was
24 conscious or not.

25 Q. Okay. Is TDOC aware that machines are

1 used to determine consciousness or determine
2 levels of anesthetic death in hospital
3 settings?

4 MR. MITCHELL: Object to the form and
5 the scope of the notice.

6 THE WITNESS: We are.

7 BY MR. KURSMAN:

8 Q. Is there a reason that a machine isn't
9 being used to determine the, quote/unquote,
10 consciousness of an inmate during the lethal
11 injection procedure?

12 A. No particular reason, other than it's not
13 part of our protocol. And we feel that the
14 warden can make the appropriate assessment
15 based on the consciousness check that's
16 currently in our protocol.

17 Q. Well, you say it's not part of your
18 protocol, but TDOC wrote the protocol. So the
19 question is, why did TDOC write the protocol
20 without requiring that a machine be in the
21 execution chamber to determine the inmate's
22 consciousness?

23 A. Because we felt like the warden was
24 appropriately -- was qualified to make the
25 determination if someone was conscious or not

1 based on the training he received.

2 Q. Let's go back to page 19. If you see
3 Number 2. It says, as an ultimate and last
4 option, the physician may perform a venous
5 cutdown procedure should the IV team be unable
6 to find a vein adequate to insert the catheter.

7 A. I'm sorry. You said page -- okay. The
8 page we're currently on.

9 Q. Yeah, I apologize.

10 A. That's no problem. I'm just tired.

11 All right. Number 2?

12 Q. Yes.

13 A. Yes, I see that.

14 Q. What does a venous cutdown procedure
15 mean?

16 A. It is a medical procedure where the
17 physician accesses an alternative point for the
18 IV -- insertion of IV fluids into the
19 individual by accessing a vein, is my
20 understanding, in the neck of the individual.

21 Q. And what does the ultimate and last
22 option mean?

23 A. If -- if there cannot be a vein
24 established by the IV team or by the EMTs, the
25 physician has the opportunity to come out and

1 make an attempt also to find an accessible
2 vein. And if that fails, the cutdown procedure
3 is a option that's available kind of as a last
4 resort to the physician.

5 Q. And who decides to call in a physician?

6 A. After the attempts are made by the EMTs
7 and they cannot -- they are unsuccessful at
8 providing a vein, they would notify the warden.
9 The warden would notify -- bring in the EMT --
10 the physician.

11 Q. And then you see Number 3. It says to
12 examine the body for vital signs five minutes
13 after the LIC has been injected?

14 A. Correct.

15 Q. Are the blinds open at this time?

16 A. No.

17 Q. The blinds are closed at this point?

18 A. Yes.

19 Q. Why wait five minutes?

20 A. You wait five minutes after the last drug
21 and saline -- or after the saline is pushed in
22 the last set of drugs, you wait five minutes to
23 give adequate time to -- for the person to
24 expire.

25 Q. And then after the inmate is declared

1 dead, are the blinds opened again?

2 A. No.

3 Q. So after the lethal injection chemicals
4 are injected, the blinds are shut, the inmate
5 is declared dead. All that happens with the
6 blinds closed. And the witnesses don't
7 actually see the inmate being declared dead; is
8 that right?

9 A. That's correct.

10 Q. Is there any reason that after the
11 injection of midazolam, the blinds couldn't be
12 briefly closed so the physician could enter the
13 room to perform a consciousness check?

14 MR. MITCHELL: Object to the form and
15 also beyond the scope of the notice.

16 THE WITNESS: I think it may be
17 possible. It would require a modification of
18 the -- of the protocol. Again, the warden
19 is -- or the warden performed -- under the
20 current protocol, the warden performs the
21 consciousness check. To bring a physician out,
22 it would require that the blinds were closed to
23 bring the physician out to do that inspection,
24 make the determination, and then re-enter and
25 reopen the blinds.

1 It's -- is it possible? Yes, it's
2 possible.

3 BY MR. KURSMAN:

4 Q. Right. That doesn't seem that
5 complicated to me. Do you think that's a
6 complicated procedure?

7 MR. MITCHELL: Same objections to
8 form and scope of the notice.

9 THE WITNESS: I don't know that I
10 would classify it as complicated. It's -- it
11 would be a change -- significant change in the
12 procedure and the training regimen, as well as
13 the physician's role in this process to
14 determine, again, if he's -- if that individual
15 would be willing to do that, participate in
16 that.

17 BY MR. KURSMAN:

18 Q. So let me just understand what those are.

19 There's two blinds in the execution
20 room. And they are just blinds that you pull
21 down, right?

22 A. Correct.

23 Q. So all it would require is somebody to
24 walk over and pull those two blinds down; is
25 that right?

1 A. Yeah. It would require those blinds
2 being pulled. It would require -- there would
3 have to be a determination made, is -- if the
4 sound was removed, the mics were cut, there
5 would have to be a determination made is if
6 the -- if the physician was willing to
7 participate in that part of the process. And
8 then those steps would have to be retraced as
9 the physician exits the room, mics return to
10 active status, and blinds raised. And how we
11 would proceed at that point, assuming the
12 inmate was unconscious.

13 Q. Sure.

14 Okay. But TDOC has not asked the
15 physician to perform a consciousness check?

16 A. No.

17 Q. Okay. Let's go to page 20 of Exhibit 1.

18 And before we get there, the
19 associate warden is in the room -- in the
20 execution chamber with the warden, correct?

21 A. That's correct.

22 Q. So there's two people that could just
23 pull the blinds down, the two blinds down and
24 then put them up, right?

25 A. Correct.

1 Q. Okay. Let's go to page 20. And this is
2 at the top, IV team. Do you see that?

3 A. Yes.

4 Q. And then it says to establish properly
5 functioning IV lines for administration of
6 lethal injection chemicals?

7 A. Correct.

8 Q. How does TDOC ensure that the IV team has
9 done this?

10 A. TDOC ensures that the -- let me -- let me
11 look at something here.

12 Q. Sure.

13 A. (Reviews documents.)

14 TDOC relies on the IV team members
15 and their training that they receive from
16 medical professionals to carry out this
17 function, as well as some of the steps listed
18 here as the monitoring of the equipment,
19 ensuring that the protocol is followed,
20 ensuring that adequate monitoring of the
21 equipment to ensure that you have adequate
22 flow, things like that, of the IV lines.

23 Q. So let's -- so let's go to 4, for
24 instance. It says to make sure vascular access
25 is properly established.

1 A. Yes.

2 Q. How does TDOC ensure this is done?

3 A. Again, by the process of the catheter
4 being inserted. Ensuring that there is a --
5 the flash in the -- within the catheter -- or
6 within the needle above the hub. Ensuring that
7 the IV line is appropriately attached. The
8 executioner in the room ensuring that they have
9 a good flow of saline from the saline and
10 through the lines into the arm of the
11 individual. Those type of processes.

12 Q. Okay. How does the executioner know what
13 a good flow would look like?

14 A. He's been trained on the -- again, when
15 you access -- forgive me. I'm just a little
16 tired. I'm trying to keep my focus here.

17 Q. Sure.

18 A. Ensuring that when the IV line is
19 connected, that there is a -- and that the --
20 the bulb -- the injection point for the saline
21 is properly attached and that you have a steady
22 drip. There's no slow process of the flow of
23 the saline into the individual. Also making
24 sure that the catheter clears itself of the --
25 of the flash -- the blood flash. It clears

1 within the hub of the needle in the injection
2 port. And those type of things.

3 Q. So at this point in the procedure,
4 though, there's no medical professionals that
5 are performing these duties, right?

6 A. There's -- no, not as I've described.
7 It's the executioner. It's the -- it's the
8 members of the IV team who are witnessing and
9 watching the process, as well as the -- the
10 EMTs who are located within the execution
11 chamber that are -- that have just, you know,
12 inserted the -- the IVs.

13 Q. And do all of these members of the IV
14 team, including the executioner, they are
15 corrections guards, right? They are
16 correctional officers, right?

17 MR. MITCHELL: I'm going to object
18 based on the protective order. But there may
19 be a way to work around that.

20 But I'm going to instruct the witness
21 not to answer that specific question.

22 BY MR. KURSMAN:

23 Q. Sure.

24 They are all employees of TDOC?

25 A. Would you -- I'm sorry. Would you re-ask

1 the question?

2 Q. We've already established that in other
3 depositions.

4 I'm just asking, are all of the IV
5 team members and executioner are corrections
6 officers?

7 MR. MITCHELL: And I'm going to
8 object based on that question and instruct the
9 witness not to answer.

10 BY MR. KURSMAN:

11 Q. Okay. But they are all employees of
12 TDOC, right?

13 A. They all -- they are employees of the
14 Department with the exception of the -- and I'm
15 excluding the EMTs, who are obviously not a
16 part of our Department.

17 Q. Sure.

18 And does TDOC consider the
19 executioner a member of the IV team?

20 A. No. The executioner is a role of itself.

21 Q. Is there a reason why there's no
22 description of the executioner in the protocol?
23 The protocol contains, between pages 13 and 29,
24 descriptions of all the roles and members of
25 the execution team. Is there a reason that the

1 protocol does not contain a description of the
2 executioner's role?

3 A. No particular reason that I'm aware of.

4 Q. Let's go to page 32 of Exhibit 1. And do
5 you see this says training execution team
6 member?

7 A. Yes.

8 Q. And then under training, we have Number
9 1. All execution team members must read the
10 lethal injection execution manual when they
11 become members of the execution team?

12 A. Correct.

13 Q. Does this include the executioner as
14 well?

15 A. Yes.

16 Q. How does TDOC ensure that each of its
17 members read the execution manual?

18 A. The facility -- the warden would ensure
19 that that is part of the process once they
20 become team members.

21 Q. Do team members receive any other
22 training materials aside from the protocol
23 itself?

24 A. Other than the information regarding
25 their specific role. For example, the

1 executioner who would rely on information
2 related from the pharmacist. But this is the
3 primary document for execution team members to
4 review.

5 Q. And how about aside from the information
6 from the pharmacist, is there any other
7 instructions that the execution members rely
8 on?

9 A. This is the primary document.

10 Q. Right.

11 So it's -- my question is, aside from
12 the protocol and the instructions from the
13 pharmacist, is there any other instructions
14 that the execution team members rely on?

15 A. For the process of carrying out an
16 execution?

17 Q. That's right.

18 A. This is it.

19 Q. Okay.

20 A. Yeah.

21 Q. Okay. And then you see it says the
22 warden or designee holds a class during which
23 the manual is reviewed?

24 A. Yes.

25 Q. Is there a discussion of issues that

1 arise during rehearsals for executions during
2 this class?

3 A. There could be. I think that the
4 discussion is not as open. It's a discussion
5 that -- where people would obviously be allowed
6 to ask questions if they had questions. So
7 it's possibly there could be discussion.

8 Q. Is there any tests done at this class to
9 ensure that the execution team members
10 understand the protocol?

11 A. Not that I'm aware of.

12 Q. And if the protocol isn't mandatory, if
13 the execution team members are allowed to
14 deviate from the protocol like you said, what's
15 the point of them reading the entire protocol?

16 MR. MITCHELL: Object to the form.

17 THE WITNESS: The protocol is in
18 place to be followed. The protocol -- the
19 commissioner -- I never said that the protocol
20 could be deviated from. There's adjustments
21 that have to be made. I want to be careful
22 that I clarify that.

23 The spirit and the intent of this
24 protocol is to be followed. And the training
25 that's required is to make sure that members of

1 the execution team have good knowledge of this
2 protocol and follow the instructions of the
3 protocol.

4 Q. Let's say the protocol says -- and I'm
5 not saying it does say this.

6 A. Sure.

7 Q. But let's say the protocol says IV Team
8 Member 2 needs to carry the execution drugs
9 from the armory to the execution chamber. And
10 the IV team members decide between themselves,
11 no, it's going be IV Team Member 4 instead.
12 Would that be a deviation, in your mind or
13 according to TDOC? Would that be allowed?

14 MR. MITCHELL: Alex, which topic of
15 examination is this pertaining to?

16 MR. KURSMAN: This would be -- this
17 would be 3, how TDOC carries out its execution
18 protocol, if that's 3. I believe that's 2.

19 MR. MITCHELL: Objection to the form
20 and beyond the scope of the notice.

21 THE WITNESS: So in that example that
22 you give, the intent is to get the execution --
23 the drug from Point A to Point B. If IV Team
24 Member 1 was identified in the protocol to do
25 that and on the way to work that evening IV

1 Team Member 1 had an accident and wasn't there,
2 IV Team Member 2 could carry out that
3 responsibility.

4 Because again, the spirit of the --
5 of the -- of the protocol and the intent of the
6 protocol is to get the drug from Point A to
7 Point B and that was carried out.

8 That would be an example of a
9 modification. A necessary modification that
10 might not go word for word with the protocol,
11 but the end goal was achieved.

12 BY MR. KURSMAN:

13 Q. Would they have to run that decision up a
14 chain of command, or would they be able to
15 decide that for themselves?

16 MR. MITCHELL: Same pair of
17 objections.

18 THE WITNESS: Again, that would be
19 something that the warden would be aware of at
20 that point.

21 BY MR. KURSMAN:

22 Q. So when you say the warden would be aware
23 of it, is the warden the person who makes the
24 ultimate decision as whether -- as to whether
25 deviations or adjustments can be made from the

1 protocol?

2 MR. MITCHELL: Form objection.

3 THE WITNESS: Again, it depends on
4 the nature of the adjustment that's being made
5 or the -- or the situation at hand. If it's
6 something that the warden has knowledge of --
7 obviously the warden's going to have knowledge
8 of that -- it would be okay with that, I'm
9 assuming.

10 But the warden is ultimately
11 responsible for the -- the protocol being
12 carried out in the facility, in the chamber, as
13 well as those minor deviations that may take
14 place. Like the example I gave before where
15 you had a strap-down team member that had
16 trouble getting a strap secured on the
17 individual and it caused a lapse in the time
18 that's listed on the protocol versus what's
19 actually happening. And there's a five minute
20 delay. The warden is not going to call the
21 commissioner and ask for permission to proceed
22 because the times are different.

23 BY MR. KURSMAN:

24 Q. So I'm just trying to figure out, does
25 the buck stop with the warden? Or does it go

1 higher than that when a deviation or an
2 adjustment is made to the protocol?

3 MR. MITCHELL: Form objection.

4 THE WITNESS: Again, depending on the
5 nature of the adjustment or why the adjustment
6 is being made. For an -- examples I'm giving
7 you minor are adjustments. The commissioner of
8 the Department is ultimately responsible for
9 the protocol and the execution or the carrying
10 out of the execution process for the Department
11 of Corrections.

12 BY MR. KURSMAN:

13 Q. What about for storing drugs? Let's say
14 the protocol says you need to store drugs in
15 this place, and instead the drug procurer
16 stores drugs somewhere else. Would you
17 consider that an adjustment or a deviation?

18 MR. MITCHELL: Form objection.

19 THE WITNESS: I would consider --
20 well, again, the drug should be stored as
21 prescribed by the -- per the instructions of
22 the pharmacy. That's --

23 BY MR. KURSMAN:

24 Q. Do you believe that to be the case even
25 if it conflicts with the protocol?

1 A. Yes. I believe that the drugs that we
2 procure should be stored in accordance with
3 the -- with the instructions from the pharmacy
4 where we purchased the drugs.

5 Q. So if the TDOC says one thing and the
6 pharmacy instructions say another, it's TDOC's
7 position that its execution teams should follow
8 the pharmacy instructions?

9 A. Give me an example of what you're talking
10 about.

11 Q. Sure. Let's say the execution protocol
12 says drugs must be stored in a container. And
13 the pharmacy owner's instructions say drugs
14 must be stored in a freezer. How does --
15 first, what should the -- what should the
16 execution team do? Which of those two
17 provisions should they follow?

18 MR. MITCHELL: Form objection.

19 THE WITNESS: They should follow the
20 instructions of the pharmacy where the drugs
21 were purchased.

22 BY MR. KURSMAN:

23 Q. And how do they know which to choose when
24 they have instructions from the protocol that
25 conflict with instructions from the pharmacy?

1 MR. MITCHELL: Form objection. Yeah.

2 THE WITNESS: They know to follow the
3 protocol -- the instructions from the
4 pharmacist where the drugs are kept.

5 BY MR. KURSMAN:

6 Q. Yeah. My question is, how would they
7 know to do that?

8 MR. MITCHELL: Same objection.

9 THE WITNESS: Because that's the
10 instruction that they received from the
11 pharmacy in the storing of that particular
12 drug.

13 BY MR. KURSMAN:

14 Q. Sure.

15 So they have instructions from the
16 pharmacy owner, but then they also have
17 instructions from TDOC. And is it your
18 testimony that TDOC believes that its
19 executioners -- members of its execution team
20 should follow instructions from the pharmacy
21 owner over their own instructions?

22 A. My testimony is that the members of the
23 execution team who handle the drugs and receive
24 the drugs and store the drugs should follow the
25 instructions of the pharmacy who provided the

1 drugs to the Department. If it's a -- if it's
2 a compounded LIC that requires freezing, it
3 should be stored in a freezer as described by
4 the pharmacy. If it's a commercially
5 manufactured drug that requires to be stored at
6 room temperature, it should be stored at room
7 temperature in a locked container.

8 Q. How would the drug procurer know to
9 follow the pharmacy instructions rather than
10 the instructions for TDOC's execution protocol?
11 Did they ask --

12 A. Ask?

13 Q. -- you as commissioner?

14 A. No.

15 Q. Did they ask the warden?

16 A. No.

17 Q. Okay. So they made that determination on
18 their own?

19 A. No. The State would ensure that the
20 drugs that we received from the pharmacy, that
21 could change again from -- when I say change
22 from a commercially manufactured drug to a
23 compounded drug, storing requirements could
24 change depending on the way it's compounded,
25 whatever. We want to make sure -- the State

1 wants to make sure that that drug is stored as
2 prescribed by the pharmacist that we -- that we
3 receive the compounding drugs from.

4 Q. No, I understand that.

5 My question is, if the protocol
6 doesn't say that -- I understand what your
7 testimony is. But if the protocol doesn't say
8 that, if the protocol doesn't say just follow
9 the pharmacy instructions but instead says this
10 is how you are to store drugs, how does the
11 drug procurer know not to follow what the
12 protocol is telling that person to do?

13 MR. MITCHELL: Object to the form.

14 THE WITNESS: Again, the people who
15 handle those drugs would follow the orders of
16 the -- or the instructions of the pharmacy
17 where we purchase the drugs from.

18 BY MR. KURSMAN:

19 Q. Right. That's not my question as to
20 which they would follow. My question is, how
21 do they know? How do they know which one they
22 should follow? Without speaking with you as
23 the commissioner, without speaking to the
24 warden, which you testified they didn't do, how
25 would the drug procurer know to follow the

1 pharmacy instructions over what TDOC tells
2 them?

3 A. They would know because to -- they would
4 know the requirements of the pharmacy because
5 they have direct contact with the pharmacy.
6 They know what the instructions are for the
7 storage of those chemicals. And it's provided
8 to them. Those instructions are provided to
9 them by the drug procurer who --

10 Q. So it's your testimony that the drug
11 procurer has the ability to not follow the
12 protocol in certain circumstances?

13 MR. MITCHELL: Object to the form.

14 THE WITNESS: Again, the drug
15 procurer is -- has the authority and
16 responsibility to follow the instructions of
17 the pharmacist and the pharmacy where we --
18 where we obtain these chemicals from. That is
19 my testimony.

20 BY MR. KURSMAN:

21 Q. Right. But my question is different,
22 which is, does the drug procurer have the
23 ability, have the discretion to not follow
24 instructions in the protocol --

25 MR. MITCHELL: Object to the form.

1 BY MR. KURSMAN:

2 Q. -- without speaking with you as the
3 commissioner or the warden?

4 A. The drug -- I'll say this again. The
5 drug procurer understands that our
6 responsibility is -- as the State is to follow
7 the instructions of the pharmacy where the
8 drugs are purchased.

9 Q. How does the drug procurer understand
10 that if they haven't spoken with you as
11 commissioner or the warden about that?

12 MR. MITCHELL: Object to the form.

13 THE WITNESS: I think the drug
14 procurer understands the nature of the -- what
15 we're doing here. And the fact that these
16 chemicals are -- he's -- that person's had a
17 lot of communication with the pharmacy.
18 There's been in-depth discussions about how
19 those drugs are shipped, handled, what the
20 expectations are, as far as the storage when we
21 receive them, when they are taken out of the
22 freezer, how long. All of those things.
23 That's --

24 BY MR. KURSMAN:

25 Q. That --

1 A. I think it's reasonably -- it's a
2 reasonable expectation there that they
3 understand those instructions.

4 Q. The drug procurer and every member of the
5 execution team has this document. It's 104
6 pages. And it was written by their bosses.
7 You said it was written by the higher-ups at
8 TDOC. And what you're telling me now is that
9 members of this execution team who aren't
10 higher-ups at TDOC can deviate from the
11 protocol when they see necessary; is that
12 right?

13 MR. MITCHELL: Object to the form.

14 THE WITNESS: No, it's not right.

15 BY MR. KURSMAN:

16 Q. Okay. Let's go to page 35 of the
17 protocol. Do you see at the top it says
18 compounded preparations?

19 A. I do.

20 Q. Okay. And now let's go to paragraph 1.

21 A. Okay.

22 Q. Okay. Do you see storage of LIC?

23 A. I do.

24 Q. And LIC is lethal injection chemicals?

25 A. That's correct.

1 Q. Okay. And do you see the last sentence
2 says, the LIC is placed in an unmovable,
3 heavy-gauge steel container with security grade
4 locks. Do you see that?

5 A. I do.

6 Q. And do you see at the top that's for
7 compounded preparations?

8 A. I see that, yes.

9 Q. Does the drug procurer store compounded
10 preparations in unmovable, heavy-gauge steel
11 container with security gridlocks?

12 A. No. The chemicals are stored -- the
13 compounded chemicals are stored in a
14 refrigerated container, per the instructions of
15 the pharmacist.

16 Q. And who made the decision to store those
17 chemicals in a refrigerator instead of a
18 heavy-gauge steel container?

19 A. That was the instructions of the
20 pharmacist.

21 Q. Who at TDOC, though, made the decision to
22 follow the instructions of the pharmacist?

23 A. The State did. The Department.

24 Q. Who at the Department?

25 A. The Department of Corrections. Myself,

1 as well as -- I'm the commissioner, as well
2 as -- that's the instructions of the State.

3 Q. You just told me a minute ago -- you
4 testified that the drug procurer never spoke
5 with you or the warden about where to store the
6 drugs. But now you're testifying that you're
7 the person who made the decision to store the
8 drugs in the refrigerator?

9 MR. MITCHELL: I --

10 THE WITNESS: What I'm -- what I am
11 attempting to tell you is that the position of
12 the State, the Department of Corrections -- the
13 Tennessee Department of Corrections, has been
14 to follow the instructions of the pharmacy in
15 the storage of the drugs.

16 BY MR. KURSMAN:

17 Q. Right. But you told me that the drug
18 procurer never asked you if the pharmacy
19 instructions conflict with the protocol of what
20 to follow. Am I right?

21 A. We never had a discussion that said, hey,
22 this protocol says one thing, the pharmacy says
23 something else. The discussion has always
24 been, we follow the instructions of the
25 pharmacy where the drugs are purchased in

1 relation to how they are stored, in what
2 environment they are stored.

3 MR. MITCHELL: Alex, I think the
4 confusion is the sentence above Paragraph 1.

5 BY MR. KURSMAN:

6 Q. But why -- why wouldn't you amend the
7 protocol to say that?

8 MR. MITCHELL: Object to the form.

9 THE WITNESS: That's a good question.
10 I'm not saying that the protocol might be
11 better if we put that sentence in there. But
12 again, the instructions are -- and the drug
13 procurer understands this, as well as the
14 warden of the facility understands that those
15 drugs are to be stored as instructed by the
16 pharmacy.

17 BY MR. KURSMAN:

18 Q. Now, let's go back to page 32, training
19 of execution team members. How do you practice
20 for determining an inmate's consciousness?

21 A. The warden performs that responsibility
22 to check for an inmate's consciousness.

23 Q. Right. How does the warden practice to
24 assess an inmate's consciousness?

25 A. So he uses -- after the midazolam is

1 administered, there's a two-minute waiting
2 period. The warden brushes the back of the --
3 the eyelids of the offender. He calls loudly
4 the offender's name. He puts his hand on his
5 shoulder and shakes -- I've even seen that.
6 Shaking the inmate and obviously doing a check
7 or a pinch of the trapezius muscle and -- to
8 determine if there's any reaction to that -- to
9 those stimuli. That's how the consciousness
10 check is performed.

11 Q. Right. I understand how he does it. But
12 my question is, how does he practice for it?
13 How is there -- do you have any practices where
14 a person -- if Person A is conscious and Person
15 B is not conscious, so he knows whether he's
16 accurately determining whether a person is
17 conscious or not?

18 A. Not in training. To my knowledge, we've
19 never had an individual who is in a training
20 session that was unconscious and somebody who
21 was conscious to do the training on those two
22 individuals, no.

23 Q. Okay. So aside from the trainings that
24 the entire execution team does, is there
25 additional training when checking for an

1 inmate's consciousness?

2 A. Other than what the warden received from
3 the physician, not that I'm aware of.

4 Q. And can you describe what exactly the
5 warden received from the physician?

6 A. Basically a summary of that process of --
7 that I just described and the visual indicators
8 that would -- the warden would use to determine
9 if somebody showed signs of consciousness.

10 Q. And what are those visual indicators?

11 A. Obviously any type of physical movement,
12 response to the stimuli, whether that be
13 calling the name of the inmate, opening his
14 eyes, turning their head, or a visual of the --
15 of the person laying there in response to the
16 stimulus.

17 Q. So is it TDOC's position that an inmate
18 opened their eyes, that would mean they were
19 conscious after a consciousness check?

20 A. Yes. That would be a sign obviously that
21 the inmate could be conscious, yes.

22 Q. What if they moved their legs?

23 MR. MITCHELL: Object to the form.

24 THE WITNESS: Possibly, yes.

25 ///

1 BY MR. KURSMAN:

2 Q. What if they moved their fingers?

3 MR. MITCHELL: Same objection.

4 THE WITNESS: Could be. Again, it
5 depends on the amount of movement and the type
6 of movement.

7 BY MR. KURSMAN:

8 Q. Why isn't it detailed in the protocol
9 that the warden should receive special training
10 on consciousness checks?

11 A. Specifically in relation to the things I
12 just said? Or is your question more -- I
13 don't -- I don't guess I understand your
14 question.

15 Q. I apologize.

16 In the protocol it does not say that
17 the warden will receive additional training for
18 the consciousness checks. Why doesn't it say
19 that in the protocol?

20 A. It just -- it just does not. The -- we,
21 as the State, realize the warden is responsible
22 for those duties as determined in the protocol.
23 And we realize that we -- the State is
24 responsible for ensuring that the warden has
25 been trained to perform that procedure and

1 recognize signs of consciousness. We did not
2 put that in the protocol.

3 Q. Do you think you should have put it in
4 the protocol?

5 A. No, not particularly.

6 Q. Let's go to page 66. Just let me know
7 when you get there.

8 MR. MITCHELL: 66?

9 MR. KURSMAN: 66, yeah.

10 BY MR. KURSMAN:

11 Q. Do you see under 7 it says, at this time
12 the warden shall assess the consciousness of
13 the condemned inmate?

14 A. Yes.

15 Q. What does the term consciousness mean as
16 used in the protocol?

17 A. The consciousness of the inmate -- of the
18 inmate's response to the stimulus of the
19 consciousness check. Obvious signs of
20 consciousness.

21 Q. Is there a difference to TDOC between
22 being asleep and being unconscious?

23 MR. MITCHELL: Object to the form and
24 scope of the notice.

25 You can answer.

1 THE WITNESS: Yes. The difference in
2 being asleep versus being unconscious would be
3 -- obviously if someone is asleep and you call
4 their name loudly and shake them or brush their
5 eyelashes or do the -- the check of the
6 trapezius muscle, there would be -- if the
7 person was just asleep, they would respond to
8 that. They would wake up or show some obvious
9 sign that they were aware of what was being
10 done. Responding to the stimulant. Someone
11 who was unconscious would not respond to that.

12 BY MR. KURSMAN:

13 Q. Is there a difference between being
14 unresponsive and insensate?

15 MR. MITCHELL: Objection. Scope of
16 the notice.

17 THE WITNESS: We believe that the
18 person being unresponsive after the onboarding
19 of the midazolam and not responding to a
20 consciousness check is indication that they are
21 unconscious and insensate to the pain.

22 BY MR. KURSMAN:

23 Q. How does TDOC believe it can make the
24 determination that someone is unresponsive
25 versus insensate?

1 A. Again -- well, first of all, the
2 Department of Corrections is not a medical
3 professional; although, there are medical
4 opinions that we feel like support that. And
5 the -- obviously the inmate is not responding
6 to the stimulus of the consciousness check,
7 that would be our position on that.

8 Q. Would be your position that they are
9 unresponsive?

10 A. Unconscious.

11 Q. Would it be your position that not
12 responding to the consciousness check would
13 mean they are insensate?

14 A. Yes.

15 Q. Would it mean that they are insensate to
16 the second drug as well?

17 MR. MITCHELL: Object to the form and
18 the scope of the notice.

19 THE WITNESS: Yes.

20 BY MR. KURSMAN:

21 Q. And would it mean that they are insensate
22 to the third drug as well?

23 MR. MITCHELL: Same objections.

24 THE WITNESS: Yes.

25 ///

1 BY MR. KURSMAN:

2 Q. And what does TDOC believe a person who
3 is unconscious, what do they believe that
4 person would look like?

5 MR. MITCHELL: Object -- yeah, object
6 to the form and also scope of the notice.

7 THE WITNESS: I'm sorry. Would look
8 like? Can you help clarify that a little bit?

9 BY MR. KURSMAN:

10 Q. Sure.

11 What -- the term unconscious is used
12 repeatedly in the protocol. What does TDOC
13 believe that an unconscious person physically
14 looks like if they are unconscious?

15 MR. MITCHELL: Same objection.

16 THE WITNESS: Someone who is -- in
17 this particular situation, someone who is
18 obviously unresponsive to stimulus, to their --
19 their eyes are closed, they are asleep -- they
20 appear to be asleep. They do not respond to
21 their names being called. They do not respond
22 to painful stimulus that's applied by the
23 warden during the consciousness check. Do not
24 respond to movement or the shaking them or
25 calling their name. Provide no response to

1 that.

2 BY MR. KURSMAN:

3 Q. Is TDOC aware of medical standards
4 related to checking for consciousness?

5 MR. MITCHELL: Object to the scope of
6 the notice.

7 THE WITNESS: No. Not particularly,
8 no.

9 BY MR. KURSMAN:

10 Q. Does TDOC understand that there are
11 different levels of sedation?

12 MR. MITCHELL: Same objection.

13 THE WITNESS: Not particularly, no.

14 BY MR. KURSMAN:

15 Q. Just -- what is the level of anesthetic
16 depth that an inmate must be under to be
17 declared unconscious?

18 MR. MITCHELL: Form and scope of the
19 notice.

20 THE WITNESS: I'm not sure.

21 BY MR. KURSMAN:

22 Q. Is it mild sedation?

23 MR. MITCHELL: Same objections.

24 THE WITNESS: I'm not sure.

25 ///

1 BY MR. KURSMAN:

2 Q. Is it local sedation?

3 A. Again --

4 MR. MITCHELL: Same objections.

5 THE WITNESS: -- I'm not sure. Our
6 determination is based on the consciousness
7 check that we do after the midazolam is
8 onboard.

9 BY MR. KURSMAN:

10 Q. Is TDOC aware that an individual could be
11 under mild sedation and not respond to the
12 consciousness check as outlined in this
13 protocol?

14 MR. MITCHELL: Same two objections.

15 THE WITNESS: Again, TDOC is of the
16 opinion with the amount of midazolam that's
17 used in our protocol, that an individual would
18 be unconscious and insensate to pain after the
19 midazolam is applied.

20 BY MR. KURSMAN:

21 Q. Right. But my question is only, is TDOC
22 aware that a person under mild sedation -- and
23 I'm not talking about this protocol -- that a
24 person under mild sedation could be
25 unresponsive after the consciousness check

1 performed as described in this protocol?

2 MR. MITCHELL: Same pair of
3 objections.

4 THE WITNESS: Not that I'm aware of.
5 BY MR. KURSMAN:

6 Q. Okay. Has TDOC ever consulted with an
7 anesthesiologist about this?

8 A. No.

9 Q. Does TDOC believe that an individual can
10 be declared unconscious under this protocol but
11 remain sensate to the second and third drugs?

12 MR. MITCHELL: Form objection. Scope
13 of notice objection.

14 THE WITNESS: TDOC is of the opinion
15 that our protocol, as I've stated, once
16 applied, the midazolam at the -- at the amount
17 that is in our protocol renders a person
18 unconscious and insensate to pain.

19 BY MR. KURSMAN:

20 Q. But TDOC did not consult with an
21 anesthesiologist, correct?

22 A. No.

23 Q. TDOC did not consult with a
24 pharmacologist?

25 MR. MITCHELL: Same objections.

1 THE WITNESS: No. Other than,
2 again -- not that I'm aware of.

3 BY MR. KURSMAN:

4 Q. How does TDOC know that a prisoner who is
5 unresponsive is under a level of sedation more
6 than just mild sedation?

7 MR. MITCHELL: Form and scope of
8 notice objections.

9 THE WITNESS: TDOC would -- based our
10 opinion on the fact that, again, considering
11 the executions that we've carried out, as well
12 as the other states that use the protocol that
13 we currently have, as well as the opinions of
14 some medical experts that would agree with us
15 that the amount of drug that we use with
16 midazolam would render somebody unconscious and
17 insensate to pain, that it's adequate for what
18 we use.

19 BY MR. KURSMAN:

20 Q. I'm just -- I'm just trying to figure out
21 how TDOC would know whether the inmate is going
22 under a mild sedation. Because I believe what
23 you testified to before was if the inmate is
24 unresponsive to the consciousness check, it
25 would then be declared unconscious.

1 So my question is, just how does
2 TDOC -- how is TDOC able to differentiate
3 between an inmate just being under a mild
4 sedation versus an inmate being under a deeper
5 level of sedation?

6 MR. MITCHELL: I'm going to object to
7 the form and scope of the notice.

8 THE WITNESS: It -- again, as you
9 know, we have no -- we have no -- that
10 determination is made by a consciousness check
11 with visual observations of the offender -- of
12 the individual that's receiving the drugs and
13 their response to any stimuli that we apply
14 during the consciousness check.

15 BY MR. KURSMAN:

16 Q. So are you saying that TDOC doesn't
17 actually know whether that individual is only
18 under mild sedation?

19 MR. MITCHELL: Same objections.

20 THE WITNESS: TDOC believes that the
21 person is, again, unconscious and insensate to
22 pain, based on the amount of drug that we
23 apply, as well as the information -- the best
24 information we have at hand.

25 ///

1 BY MR. KURSMAN:

2 Q. Sure. I'm only trying to figure out the
3 level of sedation that TDOC believes that the
4 inmate is under or how they can determine that
5 level of sedation.

6 MR. MITCHELL: What topic of
7 examination is this related to?

8 MR. KURSMAN: Certainly Topic 2, the
9 manner in which they perform the protocol. And
10 Topics 5 and 6.

11 BY MR. KURSMAN:

12 Q. So back to the consciousness check.
13 After the prisoner is declared unconscious
14 using the consciousness check that's described
15 in the protocol --

16 A. Yes.

17 Q. -- am I right that there's no way that
18 TDOC knows what level of anesthetic depth the
19 prisoner is under at that point?

20 MR. MITCHELL: Object to the form and
21 the scope of the notice.

22 THE WITNESS: Other than what I've
23 described, no.

24 BY MR. KURSMAN:

25 Q. Okay. Is coughing a sign of

1 consciousness?

2 A. I'm sorry?

3 Q. Coughing.

4 MR. MITCHELL: Same objections.

5 THE WITNESS: Again, coughing is an
6 -- could be an involuntary response that would
7 not necessarily mean that somebody is
8 conscious.

9 BY MR. KURSMAN:

10 Q. And we already discussed why TDOC didn't
11 have a doctor perform the consciousness check.
12 Why doesn't TDOC have EMTs perform the
13 consciousness check?

14 A. Other than that was the responsibility
15 assigned to the warden, there's no reason.
16 That's -- we -- the Department of Corrections
17 made the decision that the warden would be the
18 one to do the consciousness check and to
19 determine if the inmate was conscious.

20 Q. Has the warden ever been tested on
21 whether he can adequately determine what level
22 of anesthetic depth an inmate is under?

23 A. Not that I'm aware of.

24 MR. MITCHELL: Object to the form and
25 scope and notice.

1 Actually not scope of the notice. I
2 withdraw that one.

3 BY MR. KURSMAN:

4 Q. Is anyone else under the protocol -- can
5 anyone else in the protocol perform the
6 consciousness check?

7 A. No. The warden performs the
8 consciousness check.

9 MR. KURSMAN: Could we take a break
10 at this point?

11 THE VIDEOGRAPHER: One moment,
12 please. Going off the record at 4:22 p.m.

13 (Short break.)

14 THE VIDEOGRAPHER: Back on the record
15 at 4:36 p.m.

16 BY MR. KURSMAN:

17 Q. Can we go back to Exhibit 1, page 19,
18 where it says physician?

19 A. Did you say page 19?

20 Q. Page 19, yeah.

21 And do you see on duties, Number 2,
22 it says in an ultimate and last option, a
23 physician may perform a venous cutdown
24 procedure?

25 A. I do.

1 Q. Has the physician agreed to do that
2 should it be necessary?

3 A. He has.

4 Q. And do you at all discuss the physician's
5 Hippocratic Oath as it relates to Paragraph 2?

6 A. I'm sorry. I didn't understand the last
7 part of the question.

8 Q. Oh, yeah. I apologize.

9 Did TDOC and the physician discuss
10 the physician's Hippocratic Oath as it relates
11 to Paragraph 2?

12 MR. MITCHELL: Object to the form and
13 the scope of the notice.

14 THE WITNESS: Not so much the
15 Hippocratic Oath, other than his willingness to
16 perform that procedure.

17 BY MR. KURSMAN:

18 Q. Is there a reason that TDOC asked him if
19 he was willing to perform this procedure but
20 not whether he was willing to perform the
21 consciousness check?

22 A. No, there is no reason.

23 Q. Okay. Let's go to page 66. Do you see
24 this is 7:10 p.m.? This is the instructions
25 for the actual day of the execution?

1 A. Yes.

2 Q. And if you go to Paragraph 7 in the
3 middle, it says, the condemned inmate's
4 unresponsiveness will demonstrate that the
5 inmate is unconscious.

6 Do you see that?

7 A. I do see that.

8 Q. I know we talked about this a bit, but is
9 TDOC aware that if someone is unresponsive that
10 does not mean that they are necessarily
11 insensate to pain also?

12 MR. MITCHELL: Object to the form.

13 THE WITNESS: We understand that
14 there is that opinion, yes.

15 BY MR. KURSMAN:

16 Q. Is there -- is TDOC aware of a different
17 opinion that if an individual is unresponsive,
18 that means that they are insensate to pain?

19 MR. MITCHELL: Same objection.

20 THE WITNESS: TDOC is aware that
21 someone could be under certain circumstances
22 unresponsive and insensate to pain. But I
23 would clarify that to say that in our protocol,
24 with the amount of drug that we use for the
25 first drug, that it's our belief that the

1 inmate is both insensate and unconscious to
2 pain.

3 BY MR. KURSMAN:

4 Q. I believe you said TDOC is aware that
5 person could be unresponsive and insensate to
6 pain. Did you mean to say you are aware that a
7 person could be unresponsive but also sensate
8 to pain?

9 MR. MITCHELL: Form objection.

10 THE WITNESS: What I said was, is
11 that we're aware -- we are -- we understand
12 that there is opinions that say that an inmate
13 can be unconscious and sensate to pain.

14 Was that your question?

15 BY MR. KURSMAN:

16 Q. Oh, no. I'm sorry. My question is not
17 in the context of an inmate or an execution
18 protocol. My question is simply, is TDOC aware
19 that individuals can be unresponsive but still
20 remain sensate to pain?

21 MR. MITCHELL: I'm going to object
22 that's outside the scope of the notice. And
23 also object to the form.

24 THE WITNESS: TDOC is aware that
25 someone could be unconscious and sensate to

1 pain.

2 BY MR. KURSMAN:

3 Q. Okay. Who wrote the language in
4 Paragraph 7?

5 A. I'm not 100 percent sure who the
6 individual was that wrote that language. It is
7 the language of the Department for this
8 protocol. I don't know the particular
9 individual who wrote it.

10 Q. Do you know if an anesthesiologist was
11 consulted with regards to Paragraph 7?

12 A. No, I do not.

13 Q. Okay. Do you know if a medical doctor
14 was consulted with regards to Paragraph 7?

15 A. I think a medical doctor was part of
16 the -- determining the consciousness check and
17 what that would look like, as well as the
18 information in Paragraph 7.

19 Q. Do you know if a pharmacologist was
20 consulted with regards to Paragraph 7?

21 A. I do not.

22 Q. Does TDOC understand that depending on
23 the level of sedation of a person, the more
24 extreme stimuli you usurp on that person, the
25 more likely it is that they will then respond?

1 MR. MITCHELL: Object to the form and
2 scope of the notice.

3 THE WITNESS: TDOC understands that
4 that's a possibility. Again -- but I clarify
5 that to also consider that our -- our stance
6 and our protocol is based on the amount of
7 midazolam that we use to render someone
8 unconscious and insensate to pain.

9 BY MR. KURSMAN:

10 Q. Right.

11 So is TDOC aware that if a person is
12 under mild sedation and a tap on the shoulder
13 or their eyes are rubbed or they are squeezed
14 in their trapezius muscles, that they will not
15 respond? Is TDOC aware of that?

16 MR. MITCHELL: Same two objections.

17 THE WITNESS: No.

18 BY MR. KURSMAN:

19 Q. Is TDOC aware that if someone is under
20 mild sedation and they are punched in the face,
21 they will likely respond?

22 MR. MITCHELL: Same two objections.

23 THE WITNESS: No.

24 BY MR. KURSMAN:

25 Q. Okay. Does TDOC believe that -- strike

1 that.

2 The last line of Paragraph 7 says, if
3 the condemned inmate is responsive, the warden
4 shall direct the executioner to switch to the
5 secondary IV line.

6 Do you see that?

7 A. I do.

8 Q. Why does the executioner switch to the
9 second IV line?

10 A. To carry out the execution using the
11 secondary set of drugs.

12 Q. Does TDOC believe that if the inmate is
13 responsive after receiving 500 milligrams of
14 midazolam, an additional 500 milligrams of
15 midazolam will then make them unresponsive?

16 A. Yes.

17 Q. Has TDOC consulted with any medical
18 professionals regarding that?

19 A. Not that I'm aware of.

20 Q. And what if the inmate is responsive
21 after the second IV line is administered?

22 A. Then the warden would contact the
23 commissioner.

24 Q. And what would happen then?

25 A. I would delay the execution, stop the

1 execution at that point.

2 Q. And who normally directs the execution to
3 stop, if an execution is to stop? Would that
4 be the warden, the commissioner, somebody else?

5 A. The warden would contact the
6 commissioner. The commissioner, obviously,
7 would make the decision at that point to stop
8 the execution. And I would notify individuals
9 within State government.

10 Q. And then let's go to page 69. And do you
11 see it says contingency issues?

12 A. Yes.

13 Q. Are these the only contingency issues
14 that TDOC has prepared to address in an
15 execution?

16 A. These are the only contingency issues
17 that's listed in the protocol. Other
18 contingencies, I guess, it's possible could
19 come up that would require a decision being
20 made.

21 I don't know that you could list
22 every contingency. But these are the
23 contingencies that the Department thinks
24 would -- could be likely to occur.

25 Q. Does the execution team receive any

1 training on any other contingency issues?

2 A. No, not --

3 MR. MITCHELL: Object to the form.

4 THE WITNESS: Not that I'm aware of
5 specifically, no.

6 BY MR. KURSMAN:

7 Q. And what happens if a different
8 contingency arises?

9 MR. MITCHELL: Same objection.

10 THE WITNESS: Depends on the
11 contingency. The -- either the warden or
12 myself would provide the instructions based on
13 whatever the situation. It's hard to say
14 without knowing the contingency.

15 BY MR. KURSMAN:

16 Q. Let's go to page 32 of the protocol. Do
17 you see it says training of the execution team
18 member?

19 A. Yes, I see that.

20 Q. Okay. And it references an annual class.
21 What is the annual review class?

22 A. It's a review with the warden or designee
23 at the facility that he holds with the
24 execution manual of where they review the
25 manual with the team members.

1 Q. When was the most recent class?

2 A. I'm not sure.

3 Q. Does -- TDOC doesn't know what the most
4 recent class was?

5 A. I do not.

6 Q. Did you ask the warden when he held his
7 most recent class, to prepare for this
8 deposition?

9 A. I did not.

10 Q. Do you know who teaches the class?

11 A. It would either be the warden or the
12 designee. Would probably be the Assistant
13 Warden of Security Stuart.

14 Q. Is attendance required for this class?

15 A. Yes. The members of the team would be
16 required to attend this class or attend an
17 alternative review if they were not available
18 to be there.

19 Q. And what would the alternate review be?

20 A. That would be determined by the warden.

21 Q. Has that happened ever?

22 A. I'm not sure.

23 Q. Okay. And when you say members of the
24 team, is that every member of the execution
25 team is required to attend these classes?

1 A. Yes.

2 Q. And is there any assessment to ensure
3 that the protocol is clearly understood by all
4 participants?

5 A. Other than the opportunity for
6 individuals to ask questions to clarify any
7 questions they might have. To -- there is no
8 test or pass or fail, if that's your question.

9 Q. That's my question.

10 And is there a doctor present at
11 these trainings?

12 A. No.

13 Q. Is the physician that's part of the
14 execution team, is that physician present at
15 these trainings?

16 MR. MITCHELL: Object to the form.

17 THE WITNESS: No.

18 BY MR. KURSMAN:

19 Q. So how -- who confirms that the
20 executioner is performing the correct push rate
21 if there's no physician present at these
22 trainings?

23 MR. MITCHELL: Object to the form.

24 THE WITNESS: Again, the State relies
25 on the executioner's prior training and

1 experience in pushing the chemical.

2 BY MR. KURSMAN:

3 Q. And who confirms that the warden is
4 conducting an appropriate consciousness check
5 if there's no physician at these trainings?

6 A. Again, the State relies on the training
7 provided to the warden for that.

8 Q. Let's go to Exhibit 67.

9 A. You said 67?

10 Q. Yeah, 67.

11 And do you -- do you see this as a
12 chemical preparation timesheet?

13 A. I do.

14 Q. Okay. And this is July of 2018?

15 A. That's correct.

16 Q. Does TDOC know why executioner has
17 delayed the midazolam syringe preparation
18 trainings?

19 A. Yes. The delay in the preparation for
20 midazolam would be -- could be possibly the
21 start of a -- the execution protocol. Possibly
22 trying to plan for a contingency of a possible
23 stay of execution, temporary stay of execution,
24 or a decision being made regarding an appeal.

25 Because the midazolam, again, is --

1 once it's mixed, you have one hour to utilize
2 that chemical. So you certainly do not want to
3 prepare the chemical, and then have a situation
4 where an execution could be delayed more than
5 one hour, which would violate the -- the
6 instructions of the pharmacist in relation to
7 the use of the drug.

8 Q. And this one hour that you talk about,
9 that comes from the pharmacist's instructions;
10 is that what you're saying?

11 A. Yes.

12 Q. So in the executions themselves, that --
13 is that why you're delaying the midazolam
14 syringe preparations?

15 MR. MITCHELL: Object to the form.

16 THE WITNESS: Yes.

17 BY MR. KURSMAN:

18 Q. And do you -- do you believe that TDOC
19 takes the training seriously?

20 A. Yes.

21 Q. Okay. Let's go to Exhibit 68. Do you
22 see the first page? It says, the inmate name
23 Wild Bill.

24 A. I do.

25 Q. Does TDOC believe that that indicates the

1 execution team is taking the training
2 seriously?

3 A. I think the use of a name at the top --
4 just like on page 82 where it says condemned
5 and -- or say, for instance, using Xs in place
6 of the inmate's number does not in and of
7 itself indicate that individuals are not taking
8 the training seriously.

9 Q. Okay. So on the next page where it says
10 inmate name Con Demned --

11 A. Yes.

12 Q. -- you think that indicates that the
13 execution team is taking the training
14 seriously?

15 A. Again, I -- it's my belief that although
16 it's probably not the best use -- and it's my
17 understanding that the warden has corrected
18 that. But again, an individual that makes a
19 decision to put that name on the paper does
20 not -- is not an indication, in the State's
21 opinion, that the people participating in the
22 training is not taking the training seriously.

23 Q. And what about the next page where it
24 says Annie Oakley, is that the same answer for
25 the next page?

1 A. It is the same answer, yes.

2 Q. And the same answer for the next page
3 that says Doc Holliday?

4 A. Yes.

5 Q. And the same answer for the next page, it
6 says Tom Thumb?

7 A. Yes.

8 Q. And the same answer for the next page, it
9 says John Henry?

10 A. Yes.

11 Q. Is it the same answer for the next page
12 that says Billy the Kid?

13 A. Yes, it is.

14 Q. And when the execution team trains, has
15 that been referred to by the execution team
16 members as band practice?

17 A. It has.

18 Q. And do you think it's appropriate for the
19 execution team to be referring to training as
20 band practice?

21 A. I think the choice of that name had no
22 negative connotations or meaning or intent from
23 anyone within TDOC. I think that was a -- that
24 was a choice of a name to -- obviously an
25 attempt to help protect the identity of some of

1 the people that were on the team, as well as
2 protect the times and the activity that was
3 going on at the facility at that particular
4 time.

5 Again, it's the State's opinion that
6 that use of the word band practice had no
7 reflection of anyone's lack of respect or
8 understanding of the seriousness of the nature
9 of the training process for lethal injection
10 protocol or the execution -- or the
11 electrocution protocol.

12 Q. How would calling the training band
13 practice protect the individual's identities?

14 A. Again, using a term that's not -- band
15 practice versus a practice session for
16 electrocution or a practice session for lethal
17 injection would tend not to draw the same
18 amount of attention, you know, as using the
19 term band practice.

20 Q. Does TDOC have a band?

21 A. TDOC does not. But there's some
22 institutions that have bands.

23 Q. So if a TDOC employee was to tell another
24 TDOC employee they were going to band practice,
25 don't you think that would draw some questions

1 if they didn't have a band?

2 A. It -- it could --

3 MR. MITCHELL: Object to the form.

4 THE WITNESS: It could. It could.

5 But it would be an expectation that a team
6 member would not go and advertise that they
7 were going to band practice, nor an execution
8 practice or a protocol practice.

9 BY MR. KURSMAN:

10 Q. So if they are not advertising that they
11 are going to band practice, could you describe
12 for me again how that would protect the
13 identity of the individuals who are
14 participating in this execution?

15 A. Again, it's an attempt to not publicize
16 and make commonly known the times and the
17 activities or the times that these trainings
18 were going on, to try to protect the identity
19 of these people.

20 Q. Were any of the execution team members
21 disciplined for using the term band practice?

22 A. I'm not for sure.

23 Q. Were any of the execution team members
24 disciplined for using the names we just
25 discussed as the inmates involved in the

1 executions?

2 A. I'm not -- I'm not for sure.

3 Q. Let's go to page 34 on Exhibit 1.

4 MR. MITCHELL: 3-4? I'm sorry.

5 MR. KURSMAN: 34.

6 MR. MITCHELL: Okay, yeah.

7 BY MR. KURSMAN:

8 Q. And do you see that? It says the
9 chemicals used in lethal injection.

10 A. I do.

11 Q. Okay. And it has the three drugs and how
12 much of each drug should be administered. Do
13 you see that?

14 A. I do.

15 Q. Who came up with the three-drug protocol?

16 A. The State of Tennessee in consultation
17 with the pharmacist, as well as consultation
18 with other states that use the three-drug
19 protocol.

20 Q. And does TDOC trust the pharmacist?

21 A. We do.

22 Q. Does TDOC think the pharmacist is
23 qualified to opine on the three drugs to be
24 used in the lethal injection protocol?

25 A. We do.

1 Q. What type of drug is midazolam?

2 A. It's a -- midazolam is a benzodiazepine.

3 Q. And what is the level of anesthetic depth
4 that TDOC believes that midazolam can achieve?

5 MR. MITCHELL: Object to the form and
6 also the scope of the notice.

7 THE WITNESS: Clarify your -- I'm
8 sorry. Clarify --

9 BY MR. KURSMAN:

10 Q. Sure.

11 A. -- your question for a layperson.

12 Q. Sure. I apologize.

13 A. I don't understand.

14 Q. Does TDOC believe that midazolam can --
15 can achieve more than mild sedation?

16 MR. MITCHELL: Same objection.

17 THE WITNESS: TDOC believes that the
18 500 milligram of midazolam, as described here
19 in the protocol, renders a person unconscious
20 and insensate to pain.

21 BY MR. KURSMAN:

22 Q. So the reason I ask is because in the
23 medical field, the term unconscious normally
24 isn't used. It's levels of sedation. So I'm
25 just trying to figure out what level of

1 sedation TDOC believes that midazolam can
2 achieve.

3 So is it local anesthesia? Is it
4 mild sedation? Is it deep sedation? Is it
5 something else?

6 MR. MITCHELL: Same objections.

7 THE WITNESS: I don't -- I don't know
8 that I can speak to that in regard to the level
9 of sedation, other than to say that the State
10 believes that, again, as I've said, using
11 midazolam, as we have prescribed here in the
12 protocol, renders a person unconscious and
13 insensate to pain.

14 BY MR. KURSMAN:

15 Q. Does TDOC believe that midazolam is
16 typically used as an anesthetic in medical
17 procedures?

18 MR. MITCHELL: Same objections.

19 THE WITNESS: Not particularly, no.

20 BY MR. KURSMAN:

21 Q. Does -- is TDOC aware as to whether
22 midazolam is FDA approved as the sole drug to
23 produce and maintain anesthesia?

24 MR. MITCHELL: Same objection.

25 THE WITNESS: No.

1 BY MR. KURSMAN:

2 Q. Does TDOC believe that midazolam can be
3 used as a sole drug to produce and maintain
4 general anesthesia during painful surgical
5 procedures?

6 MR. MITCHELL: Same objections.

7 THE WITNESS: No.

8 BY MR. KURSMAN:

9 Q. Is TDOC aware that midazolam has a
10 ceiling effect?

11 (Reporter clarification.)

12 MR. MITCHELL: Same objections.

13 THE WITNESS: Describe ceiling
14 effect.

15 BY MR. KURSMAN:

16 Q. Sure.

17 So -- well, let me ask you this
18 first.

19 Does TDOC know what a ceiling effect
20 means?

21 A. So I'm assuming you're saying that
22 there's a level of unconsciousness that
23 regardless of the amount of drug you give, you
24 achieve no more -- a higher level of
25 unconsciousness.

1 Q. That's right.

2 A. Yeah.

3 Q. So essentially is TDOC aware that once
4 you give an individual a certain level of
5 midazolam, no matter how much more you give, it
6 will have no more effect on that individual?

7 MR. MITCHELL: Form objection and
8 scope of the notice objection.

9 THE WITNESS: TDOC, I think, is aware
10 that there's, again, different medical opinions
11 on that topic, as well as the amount of drug as
12 in relation to the level of consciousness. We
13 believe that, again, the drugs that we have and
14 the amount of midazolam renders a person
15 unconscious and insensate to pain.

16 BY MR. KURSMAN:

17 Q. Has TDOC talked to any expert who has
18 opined that midazolam does not have a ceiling
19 effect?

20 MR. MITCHELL: Object to the form.

21 THE WITNESS: We could have. I'm not
22 aware of the particulars. There could be --
23 again, our attorneys and the witnesses that we
24 have that are medical experts could possibly
25 testify to that. But I'm not personally aware

1 of that.

2 BY MR. KURSMAN:

3 Q. And if every expert testifies that at
4 some point midazolam does have a ceiling
5 effect, what would TDOC's reason be for giving
6 an additional 500 milligrams of midazolam --

7 MR. MITCHELL: Form.

8 BY MR. KURSMAN:

9 Q. -- if the inmate is insensate -- is
10 responsive after the first 500 milligrams are
11 administered?

12 MR. MITCHELL: Form and scope of the
13 notice objections.

14 THE WITNESS: I hate to ask you to do
15 it, but please repeat that. You lost me.

16 BY MR. KURSMAN:

17 Q. That was a long question. I apologize.

18 So if all experts agree that
19 midazolam has a ceiling effect at some point,
20 why would TDOC's protocol call for an
21 additional 500 milligrams of midazolam, if the
22 first 500 milligrams do not render the prisoner
23 unresponsive or unconsciousness, as described
24 in the protocol?

25 MR. MITCHELL: Form and scope of the

1 notice objections.

2 THE WITNESS: So we use 500 milligram
3 total. So we believe that -- the State
4 believes that that 500 milligrams efficiently
5 makes someone unconscious and insensate to
6 pain.

7 The State -- I'm not prepared to
8 testify as to what that ceiling effect is;
9 although, we feel like that our current
10 protocol with the amounts listed has shown that
11 an inmate -- it makes an inmate unconscious and
12 insensate to pain.

13 BY MR. KURSMAN:

14 Q. My question is only if the State's
15 experts say midazolam has a ceiling effect but
16 it's some higher point than what Plaintiff's
17 experts say the ceiling rate is, will TDOC
18 consider taking out that second set of
19 midazolam?

20 MR. MITCHELL: Same pair of
21 objections.

22 THE WITNESS: Again, I'm not sure I
23 understand your question. And -- we feel like
24 that the current protocol with the 500
25 milligrams total is sufficient and at --

1 performing its job in the protocol for lethal
2 injection. And there would be no reason we
3 would remove that or change that.

4 BY MR. KURSMAN:

5 Q. Is TDOC aware that midazolam is highly
6 acidic?

7 MR. MITCHELL: Same -- just the
8 notice objection.

9 THE WITNESS: I'm not personally
10 aware of that. I don't know that we are.

11 BY MR. KURSMAN:

12 Q. And what type of drug is vecuronium
13 bromide?

14 A. It's a paralytic.

15 Q. And I know we discussed this before. But
16 does TDOC believe that the inmate's
17 consciousness could be better assessed if it
18 was only using the first and third drugs in the
19 execution protocol?

20 MR. MITCHELL: Object to the form and
21 the scope of the notice.

22 THE WITNESS: Repeat the question,
23 please.

24 BY MR. KURSMAN:

25 Q. Sure.

1 So you testified prior that the
2 reason that vecuronium bromide was being used
3 was because it helps to effectuate the inmate's
4 death. My question to you is only, if you took
5 out that second drug, vecuronium bromide, and
6 just performed execution by a two-drug
7 protocol, is it TDOC's opinion that that
8 two-drug protocol without a paralytic, TDOC
9 team members would be able to better determine
10 whether the inmate was conscious during the
11 entire execution?

12 MR. MITCHELL: Objection to the form
13 and beyond the scope of the notice.

14 THE WITNESS: It's TDOC's belief that
15 as the consciousness check is conducted after
16 the midazolam is onboard, that taking out the
17 paralytic would not help in the process of
18 determining consciousness.

19 BY MR. KURSMAN:

20 Q. Can you describe how the warden would
21 assess the inmate's consciousness, as defined
22 in the protocol, after an inmate was injected
23 with vecuronium bromide?

24 A. The consciousness --

25 MR. MITCHELL: Object to the form.

1 THE WITNESS: The consciousness check
2 is performed before the vecuronium bromide is
3 put onboard. After the vecuronium is put
4 onboard, obviously the warden would continue to
5 monitor the inmate, his actions and his
6 response to the drugs.

7 BY MR. KURSMAN:

8 Q. Right.

9 But my question is, how would the
10 warden be able to do that if the inmate was
11 paralyzed?

12 MR. MITCHELL: Object to the form and
13 beyond the scope of the notice.

14 THE WITNESS: Right. I don't know
15 that he would. Again, unless -- if the
16 vecuronium served its purpose in paralyzing the
17 inmate, it's obvious that the inmate could not
18 respond or move. I would agree with that.

19 BY MR. KURSMAN:

20 Q. So doesn't the vecuronium bromide
21 interfere with the warden's ability to
22 determine the inmate's consciousness during the
23 entirety of the execution proceedings?

24 MR. MITCHELL: Objection, form and
25 beyond the scope of the notice.

1 THE WITNESS: It could -- it could be
2 determined, I guess, that it could affect the
3 determination of consciousness during the
4 entire process. But it's -- to me it's
5 important that the consciousness check is
6 conducted before the vecuronium is put onboard.
7 And it's also important that the process of
8 lethal injection, the end goal is to terminate
9 the inmate's life. And the vecuronium, again,
10 assists in that process by stopping the
11 breathing and paralyzing the inmate.

12 BY MR. KURSMAN:

13 Q. Isn't the warden supposed to monitor the
14 consciousness of the inmate throughout the
15 entirety of the execution procedure?

16 A. Well, the consciousness check is
17 conducted at the beginning -- or at the end of
18 the midazolam. But the monitor -- the warden
19 monitors the inmate and visualize -- with the
20 visual of the inmate through the entire
21 process.

22 Q. Would TDOC agree that there's no way to
23 monitor the inmate's consciousness once the
24 inmate is paralyzed with the second drug?

25 MR. MITCHELL: Object to the form and

1 beyond the scope of the notice.

2 THE WITNESS: I think that's a
3 reasonable -- a reasonable observation and --
4 to make since the vecuronium is a paralytic.

5 BY MR. KURSMAN:

6 Q. Is TDOC willing to execute inmates
7 without using the vecuronium bromide?

8 MR. MITCHELL: Object to the form and
9 beyond -- object to the form.

10 THE WITNESS: TDOC is -- is, again,
11 satisfied and confident that the current
12 protocol is serving the purpose. And has been
13 used flawlessly in two prior executions in
14 Tennessee, as well as in other states.

15 BY MR. KURSMAN:

16 Q. Right.

17 But would TDOC be willing to execute
18 inmates without using vecuronium bromide?

19 MR. MITCHELL: Object to the form.

20 THE WITNESS: No. We have a -- we
21 have a current protocol that's in place that is
22 being used, that is -- has been used without
23 issue. And it would be our position that our
24 current protocol is sufficient to carry out the
25 execution process.

1 BY MR. KURSMAN:

2 Q. But why not -- why wouldn't TDOC rather
3 use a protocol with drugs you already have that
4 would effectuate death, that would give the
5 warden a better ability to monitor the inmate's
6 consciousness?

7 MR. MITCHELL: Object to the form.

8 THE WITNESS: Other than reasons I've
9 already stated, again, the ultimate goal is the
10 death of the inmate utilizing the protocol that
11 we have in place. The vecuronium aids in that
12 process, and we would not change that process.

13 BY MR. KURSMAN:

14 Q. Right.

15 We discussed earlier, though, that
16 you had no expert opinions that adding the
17 vecuronium would make death any quicker and --
18 if it's just a two-drug protocol, midazolam and
19 potassium chloride. And you also testified
20 that the vecuronium bromide makes it harder for
21 the warden to monitor the consciousness of the
22 inmate during the actual execution.

23 So my question is, why won't TDOC
24 just move to a two-drug protocol, midazolam and
25 potassium chloride, so that the inmate will

1 be -- his life will be terminated as quickly
2 and the warden will be better able to assess
3 consciousness throughout the entirety of the
4 execution procedure?

5 MR. MITCHELL: Object to the form.

6 THE WITNESS: Yeah. Again, the State
7 is of the opinion that the current protocol is
8 working as designed, and there would be no
9 reason that we would want to change our
10 protocol.

11 BY MR. KURSMAN:

12 Q. What type of drug is potassium chloride?

13 A. I'm not aware of the particular type of
14 drug. It's -- I understand its function as it
15 relates to the protocol. But I can't tell you
16 the particular class or the type of drug.

17 Q. Can you tell me what its function is?

18 A. Its function is to basically stop the
19 heart of an individual in that dose.

20 Q. Do you know what will happen if the
21 prisoner is administered the second and third
22 drugs and is not insensate to pain?

23 MR. MITCHELL: Object to the form.

24 THE WITNESS: The individual would
25 experience pain from the drugs.

1 BY MR. KURSMAN:

2 Q. Do you know what type of pain?

3 MR. MITCHELL: Same objection.

4 THE WITNESS: Serious pain.

5 BY MR. KURSMAN:

6 Q. Have you consulted with any professionals
7 about that?

8 A. No. Not particularly, no.

9 Q. And we go back to page 34, to the
10 chemicals used in lethal injection.

11 A. Yes.

12 Q. How was the amount of each dose
13 determined? What I mean by that is, we have
14 500 milligrams of midazolam, 100 milligrams of
15 vecuronium bromide, and 240 milliequivalents of
16 potassium chloride. Who determined the dose
17 for each drug?

18 A. Again, that was the State's decision in
19 consultation with the pharmacist, as well as
20 considering other protocols that were used with
21 these three drugs.

22 Q. And what was discussed with the
23 pharmacist when deciding on these three drugs?

24 A. The type of drug, the amount appropriate
25 to carry out a lethal injection, and those

1 same -- again, with the pharmacist, those same
2 things were looked at as we considered other
3 protocols that used these chemicals in the
4 protocol.

5 Q. And when you say other protocols, do you
6 mean other amounts of the drug?

7 A. Other amounts and other -- yeah. Of the
8 drug itself, yes.

9 Q. So how do you come up with 500 milligrams
10 of midazolam?

11 A. Again, considering what other states
12 used, as well as the consultation with the
13 pharmacist.

14 Q. What if the pharmacist said that 500
15 milligrams of midazolam would not render a
16 prisoner insensate to the second and third
17 drugs, would TDOC still use this protocol?

18 MR. MITCHELL: Object to the form.

19 THE WITNESS: We -- again, we would
20 consider all the information related to that
21 topic from the individuals that would testify
22 as professionals -- medical professionals who
23 had a different opinion, as well as those who
24 would say that it would not make someone
25 insensate to pain.

1 BY MR. KURSMAN:

2 Q. But what if the pharmacist who helped to
3 write this protocol, what if the pharmacist
4 said, you know, I don't believe midazolam will
5 render the prisoner insensate to the second and
6 third drugs, would that cause TDOC to
7 reevaluate its protocol?

8 MR. MITCHELL: Same objection.

9 THE WITNESS: I think Tennessee would
10 -- like we have done in many cases -- not in
11 many cases, but in the past there's been
12 different opinions. We would look at all the
13 opinions and make a decision based on that, as
14 we've done in this case, in determining 500
15 milligrams.

16 We know that other states use it.
17 It's been effective. And we also know that
18 Tennessee has used this protocol in the past,
19 and its been effective in its -- in its use.

20 BY MR. KURSMAN:

21 Q. Are any of the drugs diluted before they
22 are administered?

23 A. They are mixed with the saline solution,
24 but that's -- that is per the instruction of
25 the pharmacist.

1 Q. Okay. Is that each drug is mixed with a
2 saline solution? Is that TDOC's understanding?

3 A. Well, the midazolam -- the drug itself is
4 not diluted. It's mixed with the -- with the
5 saline for -- in the -- in the syringes. As
6 you know, the vecuronium bromide is
7 reconstituted with the bacteriostatic water.

8 But that -- is that what you're
9 asking?

10 Q. That's what I'm asking.

11 A. Yes. Yes.

12 Q. And when the drugs are being diluted, how
13 is the proper PH level assessed?

14 MR. MITCHELL: Object to the form.

15 THE WITNESS: I don't know that the
16 proper PH is tested at the time, other than per
17 the instruction of the pharmacist that we use
18 to draw these drugs up.

19 BY MR. KURSMAN:

20 Q. So no one at TDOC is assessing the proper
21 PH level once these drugs are diluted?

22 A. No.

23 Q. Okay. Let's go to -- let's stay on 34.

24 And then it says chemicals were -- that last
25 full paragraph. Chemicals will either be FDA

1 approved. Commercially manufactured drugs
2 shall be compounded. Preparations prepared in
3 line with pharmaceutical standards.

4 Do you see that?

5 A. Yes.

6 Q. What is the difference between a
7 compounded and manufactured drug?

8 A. Compounded drugs are drugs that are
9 compounded in a sterile environment in a
10 sterile pharmacy using ingredients to compound
11 the particular drug. Commercially manufactured
12 drugs are drugs that are manufactured under FDA
13 approval and process that are sold as a
14 commercially manufactured drug. Many cases
15 they have different storage requirements and
16 different -- different -- either use-by dates
17 or expiration dates.

18 Q. Is TDOC aware of risks associated with
19 compounded drugs?

20 A. Yes. We realize -- and when you say
21 risks, I'm assuming you're talking about the
22 precautions that have to be taking place to
23 ensure that the sterility and all of those
24 issues are maintained of the -- of the
25 compounded drug.

1 Q. I am.

2 A. That is correct.

3 Q. Yes.

4 A. We are.

5 Q. Does TDOC ever use expired drugs?

6 A. No.

7 Q. Would TDOC ever use expired drugs?

8 A. No.

9 Q. What is done to ensure that compounded
10 chemicals are prepared in compliance with the
11 USP guidelines?

12 A. We ensure that we have a contract with a
13 -- an appropriate pharmacy that is qualified
14 and have the appropriate -- follow the
15 appropriate pharmaceutical standards and
16 licensures to compound drugs for use.
17 That's -- we have a contract that ensures that.

18 Q. And what is done to ensure that
19 compounded chemicals are prepared in compliance
20 with applicable licenses and regulations?

21 A. Again, we depend on the pharmacists or
22 the pharmacy that is under contract and the
23 requirements of that particular pharmacy to
24 have the licensures and the -- to meet the
25 requirements to provide those chemicals.

1 Q. How are the drugs transported to TDOC?

2 A. They are transported -- what drugs in
3 particular are you speaking of?

4 Q. Let's start with the compounded drugs.

5 A. They are transported per the direction of
6 the pharmacist, which in most cases is
7 transported usually in a container packed with
8 dry ice that is delivered to the facility,
9 where those chemicals are transferred to the
10 appropriate area, as defined and as required by
11 the pharmacist, with the instructions that we
12 talked about earlier.

13 Q. And how does TDOC ensure that the drugs
14 are sterile at the time of use?

15 A. By following the instructions provided by
16 the pharmacist to ensure that the drugs are
17 maintained and stored in the appropriate
18 fashion: frozen, removed 24 hours prior to
19 use, allowed -- thawed, and utilized at room
20 temperature.

21 Q. Is TDOC aware that the pharmacy from whom
22 it receives the drugs has been disciplined by a
23 State board?

24 MR. MITCHELL: Object to the form.

25 And object beyond the scope of the notice.

1 THE WITNESS: TDOC is unaware of any
2 disciplinary action that would determine or
3 render them unsatisfactory to perform the
4 duties that we have under contract with them.

5 BY MR. KURSMAN:

6 Q. Has TDOC ever refused a manufacturer's
7 request to return midazolam?

8 MR. MITCHELL: Object to the form and
9 the scope of the notice.

10 THE WITNESS: Yes.

11 BY MR. KURSMAN:

12 Q. Okay. And when was that?

13 A. I don't remember the exact -- it was a
14 few years ago.

15 Q. And why did the manufacturer request TDOC
16 to return midazolam?

17 MR. MITCHELL: Same objections.

18 THE WITNESS: Because the drug was
19 going to be used in a correctional setting to
20 take someone's life.

21 MR. MITCHELL: Can we go off record
22 real quick?

23 MR. KURSMAN: Sure.

24 MR. MITCHELL: If that's the end of
25 that line of questioning. And maybe it's not.

1 THE VIDEOGRAPHER: One moment,
2 please. Going off the record at 5:26 p.m.

3 (Short break.)

4 THE VIDEOGRAPHER: Back on the record
5 at 5:34 p.m.

6 BY MR. KURSMAN:

7 Q. Could we go back to Exhibit 1 on page 13?

8 A. Page 13, you said?

9 Q. Page 13.

10 Do you see at the top it says,
11 primary role of the warden is to ensure that
12 the procedures prescribed by law and as
13 outlined in this manual are performed?

14 A. I do.

15 Q. What does prescribed by law mean to TDOC?

16 A. The process of carrying out the execution
17 of a condemned inmate.

18 Q. What law is this paragraph talking about?

19 MR. MITCHELL: Object to the form.

20 THE WITNESS: I'm not personally -- I
21 don't have personal knowledge of the particular
22 law, as a number or not. But it's the law of
23 inmates that have been adjudicated and
24 determined to be sentenced to death in the
25 carrying out of judicial executions in the

1 state of Tennessee as prescribed by TCA code.

2 BY MR. KURSMAN:

3 Q. So when it says prescribed by law, is it
4 not also talking about the United States
5 Constitution? Or is it?

6 MR. MITCHELL: Same form objection.

7 THE WITNESS: As a nonlawyer in the
8 room, yes, it would -- the United States
9 Constitution would apply and cover what we do.
10 Yes.

11 BY MR. KURSMAN:

12 Q. And who wrote this language, this
13 paragraph right here?

14 A. That language has been in the protocol
15 for some time. And I'm not -- I'm not sure who
16 exactly wrote that language.

17 Q. Okay. Has TDOC ever removed anyone from
18 the execution team?

19 A. Removed in regard to?

20 Q. Taken an individual off the execution
21 team who was on the execution team.

22 MR. MITCHELL: I'm going to object to
23 the form.

24 THE WITNESS: Yeah, that would be a
25 question for the warden. I -- I think so. But

1 I don't have personal knowledge of a particular
2 individual that was removed. But I believe
3 that that is accurate.

4 BY MR. KURSMAN:

5 Q. And it's your testimony that the person
6 who would have better knowledge would be the
7 warden?

8 A. Yes.

9 MR. MITCHELL: Alex, what topic of
10 examination would that pertain to?

11 MR. KURSMAN: Sure.

12 2.

13 MR. MITCHELL: I'm going to object
14 based on the scope of the notice.

15 MR. KURSMAN: 19.

16 MR. MITCHELL: Same objection.

17 MR. KURSMAN: 20.

18 BY MR. KURSMAN:

19 Q. Could we go to Exhibit 50?

20 A. Did you say Exhibit 50?

21 Q. 50. 5-0.

22 A. I'm sorry.

23 Q. Have you seen this document before?

24 A. I'm sorry. It's taking me a minute to
25 get there.

1 Q. Sure.

2 A. Yes.

3 Q. Okay. And are you the one who filled out
4 this document?

5 A. Yes.

6 Q. Okay. So let's go to IV Team Member 5.
7 Do you see that at the bottom?

8 A. Yes.

9 Q. Why did IV Team Member 5 only participate
10 in one training session?

11 A. Let me -- let me refresh my memory here
12 and look at this.

13 (Reviews documents.)

14 I don't remember the specifics of IV
15 Team Member 5, as to why he did not -- or she
16 did not participate in that -- in those
17 sessions.

18 Q. No. My question is, why did they only
19 participate in one training session?

20 A. I do not know.

21 Q. And what about IV Team Member 6, why did
22 they only participate in one training session?

23 A. Again, I do not know. I would have to
24 speculate if I gave you an answer to that.

25 Q. Do you know whether IV Team Member 5 or

1 IV Team Member 6 participated in
2 Donnie Johnson's execution?

3 A. I do not.

4 Q. Do you know whether IV Team Member 5 or
5 IV Team Member 6 participated in
6 Billy Ray Irick's execution?

7 A. I do not.

8 Q. Are the people who are identified as IV
9 Team Member 1 and IV Team Member 2 and IV Team
10 Member 3, are they still part of the execution
11 team?

12 MR. MITCHELL: Object to the form.

13 You may answer.

14 THE WITNESS: I would need to review
15 the documents to see who IV Team Member 1 and
16 IV Team Member 3 is personally to answer that
17 question.

18 BY MR. KURSMAN:

19 Q. So do you know right now, as spokesperson
20 for TDOC, which -- who out of -- out of these
21 IV team members are the current IV team members
22 in the execution team?

23 A. No, not without -- not without making the
24 identification of who IV Team Member 1 or 3 or
25 4 was referring to. No.

1 Q. Could we take a look at Exhibit 2?

2 A. I have it.

3 Q. Do you see that it says midazolam storage
4 and preparation instructions?

5 A. Yes.

6 Q. And it includes instructions for storage
7 and preparation of midazolam?

8 A. Correct.

9 Q. Okay. Now, let's go to Exhibit 4. And
10 do you see that potassium chloride preparation
11 instructions?

12 A. Yes.

13 Q. Does TDOC also have vecuronium bromide
14 preparation instructions?

15 A. Currently the vecuronium bromide that we
16 have is, as I understand it, commercially
17 manufactured and stored at room temperature.

18 Q. Do you -- does TDOC have written storage
19 instructions for the vecuronium bromide?

20 A. I believe we do, yes.

21 Q. Does TDOC have written instructions for
22 how to prepare the vecuronium bromide?

23 A. We do.

24 Q. And is that how the executioner knows how
25 to reconstitute the vecuronium bromide?

1 A. It is.

2 Q. And were both Exhibit 2 and Exhibit 4
3 provided by the pharmacist?

4 A. Yes.

5 Q. Do you know what the color is of the
6 content of the prepared syringes?

7 A. The color?

8 Q. Of the prepared syringes. Are they
9 clear, or are they something else?

10 MR. MITCHELL: Object to the form.

11 THE WITNESS: No, I do not know.

12 BY MR. KURSMAN:

13 Q. Does --

14 MR. MITCHELL: Are you asking about
15 the potassium chloride?

16 MR. KURSMAN: No, just the syringes
17 themselves.

18 BY MR. KURSMAN:

19 Q. Does TDOC know what falling out of
20 solution means?

21 A. I do not, no.

22 Q. Do you know who checks on the execution
23 team to determine the lethal injection
24 chemicals are falling out of solution?

25 A. No, I do not.

1 Q. Let's go to page 39 of Exhibit 1.

2 (Reporter clarification.)

3 BY MR. KURSMAN:

4 Q. And do you see in Paragraph 2, it says if
5 the LICs are drawn in syringes by one member of
6 the execution team, another member of the
7 execution team observes and verifies that the
8 procedure is carried out correctly?

9 A. Yes.

10 Q. Who draws the LICs in the syringes?

11 A. The executioner.

12 Q. How is it determined that the executioner
13 do that?

14 A. Well, the executioner is the one
15 responsible for that. I mean, that's the --
16 he's the one that has received the training for
17 that particular event, and he is the individual
18 who draws the chemical.

19 Q. And then do you see it says another
20 member of the execution team observes and
21 verifies that the procedure has been carried
22 out correctly?

23 A. Yes.

24 Q. What does it mean for the procedure to be
25 carried out correctly?

1 A. That the LICs are drawn accordingly to --
2 according to the directions as provided by the
3 pharmacist, placed in the correct order in the
4 trays, and identified in the right sequence.

5 Q. How does the execution team member, who
6 is not the executioner, verify that the
7 procedure has been carried out correctly?

8 A. That person knows the protocol and knows
9 the process for drawing these chemicals and
10 monitors that to ensure compliance with the
11 instructions that have been provided by the
12 pharmacist.

13 Q. When you say that person knows the
14 protocols, do you mean that person knows the
15 instructions as provided by the pharmacist?

16 A. Yes.

17 Q. Does that person know the instructions
18 for midazolam as provided by the pharmacist?

19 A. Yes.

20 Q. Does that person know the instructions
21 for vecuronium bromide as provided by the
22 pharmacist?

23 A. Yes.

24 Q. Does that person know the instructions
25 for potassium chloride as provided by the

1 pharmacist?

2 A. Yes.

3 Q. And is there a point where those
4 instructions are reviewed at all? Meaning does
5 the executioner and this additional IV team
6 member review those instructions at any point?

7 A. Those instructions are part of their
8 preparation, and they are familiar with those
9 instructions, yes.

10 Q. And who decides which member of the IV
11 team will verify that the executioner's
12 performing his job correctly?

13 A. That is -- that is a responsibility of
14 the IV team members that are in the room with
15 them. Those individuals -- I know who they
16 are. They are -- they carried out that
17 responsibility for the two executions in
18 question that we talked about.

19 Q. And how do they have the knowledge to
20 verify that the executioner is doing -- doing
21 this correct?

22 A. You know, they -- the knowledge that they
23 have, as provided per the instructions of the
24 pharmacist, as well as the instructions that
25 are in the protocol and verify that the

1 executioner is following those protocols as
2 defined in the instructions from the
3 pharmacist, as well as the instructions that
4 are in the protocol.

5 Q. Do any members of the IV team member have
6 the -- the IV team members have experience
7 reconstituting drugs?

8 A. No. Other than their role in observing
9 the executioner in the -- in their -- in the
10 executioner's reconstituting the drug during
11 this process.

12 Q. So how would they be able to verify?

13 A. Verify what?

14 Q. Verify that the -- that the executioner
15 is doing it correctly?

16 A. Again, they know the instructions and
17 their -- their purpose -- their responsibility
18 is to ensure, again, that the instructions are
19 followed. To verify that, to observe it, both
20 the instructions of the pharmacist, as well as
21 the instructions that are found in the
22 protocol.

23 Q. Do the instructions require the IV team
24 to fill all nine red syringes first, before
25 they fill the blue syringes?

1 MR. MITCHELL: I'm just not following
2 you. What instructions are we talking about?

3 MR. KURSMAN: The instructions both
4 from the pharmacist and from the protocol.

5 BY MR. KURSMAN:

6 Q. I'm just trying to figure out how it's
7 done in the executioner's room.

8 A. Yeah. So the executioner --

9 MR. MITCHELL: I'm going to object to
10 the form.

11 But you can keep going.

12 THE WITNESS: I don't know that
13 the -- the instructions from the pharmacist
14 would not dictate which set of drugs that
15 are -- which set of chemicals, either the red
16 set or the blue set, are prepared first or
17 second. The protocol says that the -- there
18 will be two sets prepared.

19 Personally, I don't remember if
20 there's a particular order. I think the
21 executioner has a -- has a pattern that he
22 follows in every case that's the same. And --
23 but I don't recall from memory exactly how --
24 what set is first or what set is second.

25 ///

1 BY MR. KURSMAN:

2 Q. You don't know which set was first and
3 which set was second, you're saying?

4 A. No, I don't.

5 Q. Okay. Was the second set of syringes
6 prepared for Mr. Irick's execution?

7 A. I'm not sure that it was.

8 Q. Do you know -- does TDOC know whether or
9 not the second set of syringes was prepared in
10 Mr. Irick's execution?

11 A. I'm not sure. I would have to confirm
12 with the executioner.

13 Q. Does TDOC not take an inventory of the
14 drugs that are used and not used after an
15 execution occurs?

16 A. We do.

17 MR. MITCHELL: Object to the form.

18 BY MR. KURSMAN:

19 Q. And you -- there have only recently been
20 two executions using this lethal injection
21 protocol, right?

22 A. That's correct.

23 Q. And TDOC does not know whether the backup
24 set was prepared in one of those two
25 executions?

1 A. For me to answer the question, I would
2 have to check the inventory. Because if it was
3 not, the inventory would reflect that, of
4 course, in the record.

5 Q. And if it was not, would you consider
6 that a deviation from the protocol?

7 MR. MITCHELL: Object to the form.

8 THE WITNESS: Again, if it was not,
9 that would be an adjustment that was made to
10 the protocol. But for the -- what particular
11 reason, I would not -- I don't have knowledge
12 of at this point.

13 BY MR. KURSMAN:

14 Q. And who would be able to decide to make
15 that deviation?

16 MR. MITCHELL: Object to the form.

17 THE WITNESS: It would be the
18 executioner, based on whatever circumstances
19 were -- involved that decision being made.
20 Again, I don't have the knowledge to answer
21 that question.

22 BY MR. KURSMAN:

23 Q. And does TDOC believe that the
24 executioner has the discretion to deviate and
25 prepare only one set of syringes?

1 MR. MITCHELL: Form.

2 THE WITNESS: TDOC's position would
3 be that the -- the protocol should be followed
4 where there were two sets of syringes prepared,
5 unless there was a -- some issue that prevented
6 the second set from being prepared.

7 BY MR. KURSMAN:

8 Q. Okay. And who gets to determine whether
9 or not to deviate from the protocol and only
10 prepare one set or follow that protocol and
11 prepare both sets?

12 MR. MITCHELL: Form objection.

13 THE WITNESS: Again, we would --
14 there would have to be an examination of the
15 circumstances that preempted that decision for
16 me to answer that question.

17 BY MR. KURSMAN:

18 Q. Did TDOC do an examination of the
19 circumstances after Mr. Irick's execution?

20 MR. MITCHELL: Same objection.

21 THE WITNESS: No, not that I'm aware
22 of.

23 BY MR. KURSMAN:

24 Q. Did TDOC do an examination of the
25 circumstances after Mr. Johnson's execution?

1 MR. MITCHELL: Same objection.

2 THE WITNESS: By examination, could
3 you clarify that?

4 BY MR. KURSMAN:

5 Q. Sure.

6 Does TDOC evaluate the performance of
7 all the individuals involved in an execution
8 after an execution goes forward?

9 A. We observe and we evaluate the entire
10 process from a visual standpoint and an
11 observation standpoint.

12 Q. And would one of the things that TDOC
13 does after an execution is to ensure that the
14 execution team members follow the protocol?

15 A. Yes.

16 Q. Okay. And if an execution team member
17 deviated from the protocol, would TDOC do
18 anything about that?

19 MR. MITCHELL: Object to the form.

20 THE WITNESS: Other than, again, we
21 would -- we should evaluate the circumstances
22 to determine why the adjustment was made.

23 BY MR. KURSMAN:

24 Q. And if a backup set was not prepared in
25 Mr. Irick's execution, would TDOC consider that

1 a substantial deviation from the execution
2 protocol?

3 MR. MITCHELL: Form.

4 THE WITNESS: It would be a -- it
5 would be a -- an adjustment that -- again, that
6 the State would look at to determine -- to make
7 that determination we would have to, again,
8 consider the circumstances and why the
9 deviation or the adjustment was made.

10 BY MR. KURSMAN:

11 Q. But as of now TDOC is unaware whether
12 that deviation was made?

13 A. As I sit here today, to my knowledge, I
14 would have to review the records to
15 appropriately answer that because I don't have
16 the information in front of me to answer your
17 question.

18 MR. KURSMAN: Okay. Could we take a
19 two-minute break now? And then I'll be done
20 and wrap it up.

21 MR. MITCHELL: Sure.

22 MR. KURSMAN: Okay.

23 THE VIDEOGRAPHER: Going off the
24 record at 5:57 p.m.

25 (Short break.)

1 THE VIDEOGRAPHER: Back on the record
2 at 6:03 p.m.

3 BY MR. KURSMAN:

4 Q. Just a few more questions.

5 Is TDOC aware of what size IV line
6 tubing is used in the executions?

7 A. No.

8 Q. Okay. Did you take any notes during the
9 deposition today?

10 A. No.

11 Q. Did you have any documents in the room
12 with you, other than the exhibits we discussed?

13 A. No.

14 Q. And did you bring with you the documents
15 that you reviewed in preparation for the
16 deposition today?

17 A. I did not bring them with me, no.

18 Q. And did you take any notes during your
19 preparation for the deposition today?

20 A. No.

21 MR. KURSMAN: Okay. We would
22 just request all the documents that
23 Commissioner Parker reviewed in preparation for
24 the deposition. And we'd also request the size
25 of the IV tubing used in the execution

1 procedures.

2 MR. MITCHELL: That request is still
3 under considering per yesterday. And all the
4 documents he reviewed have already been
5 provided.

6 MR. KURSMAN: Okay. And we'd also
7 request the vecuronium bromide instructions, to
8 the extent they exist.

9 MR. MITCHELL: Understood.

10 MR. KURSMAN: And we can go off the
11 record. We're done.

12 THE VIDEOGRAPHER: All right. If
13 there are no more questions, this concludes the
14 deposition. The time is 6:05 p.m.

15 THE REPORTER: Do you want to order
16 this transcript?

17 MR. KURSMAN: Yes, please.

18 THE REPORTER: Okay. Would you like
19 a copy?

20 MR. MITCHELL: Yes.

21 FURTHER DEPONENT SAITH NOT

22 (Proceedings concluded at 6:05 p.m.)
23
24
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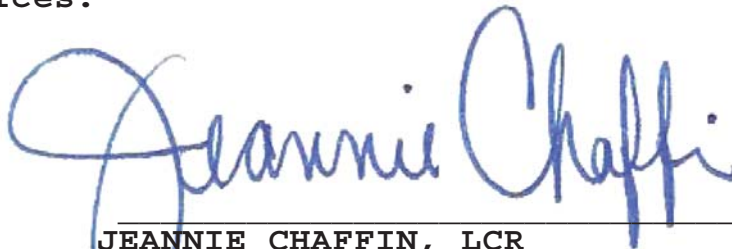
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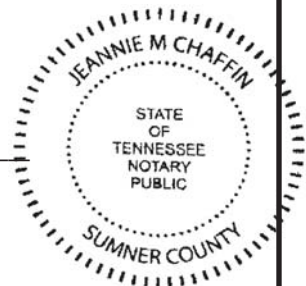
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